IN THE COMPETITION APPEAL TRIBUNAL

Case No:1579/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 10th July – Wednesday 12th July 2023

Before:

Hodge Malek KC
Michael Cutting
Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Applicants

(1) Cérélia Group Holdings SAS
(2) Cérélia UK Limited

V

Respondents

Competition and Markets Authority

A P P E A R AN C E S

Brian Kennelly KC and Alison Berridge (On behalf of Cérélia) Instructed by Willkie Farr & Gallagher (UK) LLP

Robert Palmer KC and Mike Armitage (On behalf of Competition and Markets Authority)

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Monday, 10 July 2023

(10.30 am)

Housekeeping

THE CHAIR: Some of you are joining us livestream on our website, so I must start, therefore, with the customary warning. An official recording is being made and an authorised transcript will be produced but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: Good morning. May it please the tribunal, I appear with Ms Berridge for the applicants. My learned friends Mr Palmer KC and Mr Armitage appear for the CMA.

The tribunal, by way of housekeeping, should have, if we are using hard copy, one core bundle, three hearing bundles, the first of which contains two skeletons, and then two volumes of the parties' internal documents and three volumes of disclosure provided by the CMA. Then we have five volumes of authorities.

I am sure I can give the tribunal electronic bundle references. I am working from the hard copy.

THE CHAIR: I am checking if I have everything. Yes.

MR KENNELLY: As Mr Palmer reminds me, there is a confidential marked-up bundle the tribunal was sent on Friday.

THE CHAIR: Yes.

MR KENNELLY: That reflects the agreement between the parties as to what can and can't be read and how it should be read out in open court, the colours delineating the

parts that must not be read and the colours delineating what must be read with care, so as not to identify any confidential information.

THE CHAIR: Okay.

MR KENNELLY: Subject to the tribunal, we have divided the time. I will take, if I may, all of today, some of the morning. Mr Palmer will have the same amount of time, following me and I will have about an hour or so in reply. We should finish well within the time.

THE CHAIR: We'll see how we get on and we'll assess where we are.

One thing that I would like to have is a table of cross-references where you say there's an error in respect of the evidence or where you say the evidence is misleading or you have not been given a proper gist. I want what you say the error is, then give the reference to the pleadings for both sides, with the page reference in the bundle, the reference to where it is dealt with in the respective skeleton arguments of both parties, and insofar as it's in, for example, one of the annexes, I need to know which page of the bundle that annex is in.

Then where it's covered in the Final Report and then any other references. But, Mr Kennelly, you have lost your pen.

MR KENNELLY: Yes.

THE CHAIR: What I don't want it to be, is an argumentative document. It just needs to be a document with all the references, so when it comes to looking at the material, everything I need to have and look at is on that relevant piece of paper for each allegation. So if we can have that by Wednesday. I am sure, Mr Kennelly, you won't do it but the people behind you and your junior will do that and once you've done your effort, then send it to Palmer's lot and any reference they want in, let them have it in, so I can just see what I need to look at. But the idea is if we can have that by close of business on Wednesday, that's a good start.

One of the things I need to get my head around and it may or may not make any difference to the result, is whether or not, when you are provided with the gist of the evidence, that gist is not misleading because people challenging merger decisions and tribunals, at the end of the day, will want to be sure they can be confident the gist has adequately been summarised. Obviously, mistakes will occur and there may be differences of emphasis and fact. I don't mind that. But if there is anything that is positively misleading, where they say: this is fact A but, actually, there's nothing to support fact A, they've got something that says the opposite to what they are saying, I need to know whether this is that type of case.

This isn't the first case I've done where there's a root and branch challenge to an assessment by the CMA as to evidence. We had that in Tobii. But it's all a question of fact and degree. The basic test is I am not -- there may be minor errors, okay. But if there's no evidence at all to support an allegation of fact or finding, that's one thing. We can clearly intervene. If it's merely a question of how you assess different pieces of evidence and the two different people may come to a different view on the evidence below, that's not really a job for the tribunal and that's not really a ground. You understand what the levels are.

But there may be something in between, where you have a situation where a factual statement is made and that that is actually positively misleading in the light of what the CMA has and that may be a situation where it doesn't quite fall within one, it doesn't fall within two either because you can say: well this is part of their assessment of the evidence, but I'd like to know to what extent are we dealing with that type of scenario.

MR KENNELLY: All right. Just taking them in turn. First of all, in relation to the first request, of course we will ensure that we produce that and provide it to the CMA in time for Wednesday, close of play. On the second point, and the question of gist and misleading summaries, there is a distinction in our grounds and I will make in my

submissions, between the substantive irrationality of the CMA's assessment and the procedural errors we say they made and hopefully, as I develop my submissions, you'll see that distinction.

The primary case in relation to their substantive errors is not a case about gisting. Now, finally, we have the underlying evidence base that the CMA relied on and I will present that to you and hopefully demonstrate by reference to it, that no reasonable competition authority could have found an SLC on the basis of that evidence.

On the final point, the question of whether reasonable people would disagree and absence of evidence, I will come to that in my legal submissions.

THE CHAIR: Yes, of course you will.

MR KENNELLY: But there are two different issues, as you'll see in the submissions. One is substantive irrationality which I have just mentioned and the other is procedural unfairness arising from misleading gist being provided or consultees not being properly appraised of the matters upon which they are being consulted. And that's a procedural issue and I will come back to that as I get to that ground in my submissions.

But I have the chairman's warning about the proper scope of an irrationality challenge well in mind.

THE CHAIR: It's not a warning, don't worry, I know you know what the test is, don't worry.

MR KENNELLY: So what I propose to do, subject to the tribunal, is to introduce our case, then go to the authorities and then the grounds in order.

THE CHAIR: Yes.

MR KENNELLY: In summary then, as the tribunal has seen, this case concerns, essentially, whether the CMA has established to the requisite standard the particular competitive constraint that the merger would remove and its importance relative to the other competitive constraints. In this case, the CMA's alleged constraint is very

specific. The CMA found that grocery retailers exercise a threat over the parties. What is the threat? The threat is that if one of the parties does not offer a good deal on price or quality, the retailer will switch in whole or in part from private label to Jus-Rol products and vice versa.

The CMA found that retailers used this threat to play the parties off against each other to obtain better terms and services and that this threat was so important that its loss was enough to create an SLC. The problem for the CMA is that this important threat does not exist. There is no probative evidence that it exists. There is no evidence of a retailer saying to Cérélia or Jus-Rol: if you do not improve your price or quality, I will buy less from you and more from Cérélia or Jus-Rol.

CMA's answer to this is that the threat is implicit and it was so successful and well understood that it never required any articulation, not even in the parties' internal documents. Now we say that's inherently unlikely, where large, sophisticated traders negotiate aggressively, as we will see in this case and there's extensive evidence that the retailers are well able to threaten the parties when they choose to do so. The simple fact is that retailers do not threaten Cérélia with Jus-Rol or vice versa to get better terms because from the retailer's perspective, they do not have that level of control over what their customers purchase.

You will see in the evidence that customers are not a blank canvas, they have preferences. If a shopper walks into Tesco, looking for a private label product, there's relatively little that Tesco can do to persuade them to buy Jus-Rol instead or vice versa. If Tesco does use the levers that it has, like price or taking some products off the shelves, it risks upsetting its customers and losing sales to other retailers. That's, fundamentally, not what retailers do and the evidence makes this crystal clear.

In this case, critically, the CMA's SLC concerns the retailers and their perspective. The CMA accepts that when retailers buy dough-to-bake products, they do not directly

pit Cérélia and Jus-Rol against each other. When they want private label services, they pit Cérélia against other private label suppliers, like Bells and Henglein, in a tender process. When the retailers want consumer brand product, they negotiate with Jus-Rol bilaterally, pitting it against other brands, like Northern Dough. Now that does not mean there's no competition from a consumer perspective. The consumer, at least to some extent, does regard the private label product and Jus-Rol as substitutes, but this must not be overstated. You'll see in the evidence that consumers switch between the two relatively seldom and brands like Jus-Rol command a significant premium in price. But the documents do refer to some competition between private label products and Jus-Rol in the supermarkets and Jus-Rol wants to attract consumers away from private label products. And there's evidence that retailers will stock more private label and less Jus-Rol, for example, if that is what their consumers prefer but it does not follow and this is critical to our first ground, it does not follow that the retailers will stock more private label and less Jus-Rol to secure better wholesale terms.

That goes against the fundamental need to stock the product that the customers want. To succeed in this appeal, the CMA needs to show that retailers will switch from private label to Jus-Rol and vice versa, in order to get better terms from Cérélia and Jus-Rol, not because of consumer preference. They need to do it in order to get better terms from Cérélia and Jus-Rol and that Cérélia and Jus-Rol appreciate that threat. In the thousands of documents in this case gathered by the CMA, you will not see that.

Part of the reason for that is the highly differentiated nature of what Cérélia and Jus-Rol offer to the retailers. The CMA ignores all of that, at least in skeleton, and I will read just paragraph 19.5. There's no need to turn up the skeleton now. It says:

"This case is about the biggest wholesale supplier of dough-to-bake products acquiring its competitor, the second biggest wholesale supplier of dough-to-bake

products."

That summary has two major flaws. First, it treats Cérélia and Jus-Rol as if they are directly competing in what they sell to retailers and even the Final Report doesn't say that that is the case. But, second, the reference to their market share, the current size of the market share they have, ignores the question of whether Cérélia's smaller rivals, by market share, in fact have so much spare capacity that they could step in and increase their share if Cérélia raised its prices.

Because as to that, as the tribunal has seen, the CMA finds that the merger would allow both Jus-Rol and Cérélia to raise their prices over current levels. Now as regards Cérélia's prices, we say that's a hopeless finding. There is massive spare capacity in the private label manufacturing market. The evidence shows clearly that if Cérélia raised its prices for private label supply, its rivals, with that massive spare capacity, would step in and take the business.

But if you accept the CMA's own case that private label constrains brand, the same point must apply to Jus-Rol. If Jus-Rol prices increase, on the CMA's case consumers will switch to private label and we can demonstrate for sure that private label prices are constrained by the spare capacity that Cérélia's rivals have.

Now that, in summary, is our ground 1A. It's our main ground and the other grounds I will introduce as I come to them in order. But with that summary, I will turn, if I may, to the authorities. My focus -- and I will deal with the authorities relatively briefly because I am focussing only on the standard of review which I know is very familiar to the tribunal, but in its skeleton, the CMA suggests that the tribunal has no role in reviewing the probative value of or the overall adequacy of the evidence on which the CMA relies. I will show you where I get that from in the CMA's skeleton and here, I would ask the tribunal to take up the CMA's skeleton. If you have it in -- it's in the hearing bundle 1, tab 2 at page 27, is the page I wish to go to first.

MR RIDYARD: Sorry, the reference?

MR KENNELLY: Hearing bundle 1, tab 2, page 27. It's paragraph 13.1 of the CMA's skeleton. The CMA is here referring to the Law Society case and it says about two lines down that:

"Where a rationality challenge targets the evidential basis for a public authority's decision, the critical question is whether there was no evidence to support an important step in the reasoning and not whether the evidence marshalled in support of a given conclusion was adequate in the eyes of the applicant or the court."

13.2 begins on that same page, 27, but I am going to take you, if I may, over the page to 28, to the very top of page 28, where the CMA says:

"The focus is thus on the presence or absence of evidence and not on the public authority's evaluation of that evidence."

If you skip on to page 29, you'll see in paragraph 16, the same point is made about halfway down 16. The sentence begins:

"But in any event, the complaint about the way in which the CMA assessed the evidence it had is very different from a complaint that there was no probative evidence at all in support of the SLC finding. The former amounts to an invitation to the tribunal to second-guess the CMA's expert assessment of the evidence but as the discussion of the law above makes clear, that's not an appropriate invitation in the context of a rationality challenge."

If you skip back to paragraph 15, the previous page 28, this is the final extract from the skeleton, one that raises real concern because about halfway down 15 on page 28, the CMA says this:

"The tribunal is invited to read the summary of the evidence in the defence and ask itself whether a reasonable regulator could conclude that the evidence justified a finding that the merger would result in an SLC in relation to the wholesale supply of

DTB products in grocery retailers in the UK."

And they say the answer to that is yes.

So we say there are two things being suggested by the CMA here. The first is that it's not open to you to consider the adequacy of the evidence supporting the various stages of the CMA's reasoning. It's enough simply to show they had something. Secondly, that the tribunal can properly limit its task to reviewing the CMA's own summary of the evidence and decide on that basis that the SLC finding was justified.

Now on the first point, the tribunal's task, as I am sure the tribunal knows, is not simply a binary question, is there some evidence or is there no evidence, the tribunal must necessarily examine the evidence itself to see if it has some probative value.

On the second point, again the authorities are clear, the tribunal must examine the evidence for itself. Now, of course, you must apply a rationality standard to it but you should not limit yourselves to the summaries provided by the CMA.

Now as to the proper approach in the authorities, I will just show you two briefly, if I may. The first is Stagecoach in this tribunal and that's in the first authorities bundle, tab 19. You can put the hearing bundle away. I have finished with the CMA's skeleton. But Stagecoach is in the first authorities bundle behind tab 19. It begins at 786 and I would ask you to go to page 801, beginning at paragraph 43.

Here, the tribunal is considering the relevant judicial review principles and this, of course, is a merger case and at paragraph 43, the tribunal refers to the Competition Commission's reference to an earlier case, BSkyB, and the tribunal, where it quoted from Wade & Forsyth as follows:

"It's one thing to weigh conflicting evidence which might justify a conclusion either way or to evaluate evidence wrongly, it's another thing altogether to make insupportable findings. That's an abuse of power and may cause grave injustice. At that point, therefore, the court is disposed to intervene."

Then this, and this is important on the no evidence/some evidence point, indeed the one I discussed --

THE CHAIR: Which paragraph were you looking at?

MR KENNELLY: Paragraph 43. It's the indented passage on page 801.

THE CHAIR: Yes.

MR KENNELLY: It's paragraph 43. I am reading the indented passage from Wade & Forsyth cited in BSkyB, the second part of the indented passage:

"No evidence does not mean only a total dearth of evidence. It extends to any case where the evidence taken as a whole is not reasonably capable of supporting the finding or where, in other words, no tribunal [in this case, no regulator] could reasonably reach that conclusion on the evidence."

That no evidence principle has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires.

At 45, that was a point put to it by the Competition Commission and the tribunal says:

"We accept the Commission's analysis of the case law on this point and we agree that the hurdle that Stagecoach has to overcome in order to make good such a challenge, is a high one."

We don't resile from that:

"When Stagecoach asserts there's no or no sufficient evidence, they have to show either there is simply no evidence at all to support the Commission's conclusions, [which is the CMA's point] or [and this is mine] that on the basis of the evidence, the Commission could not reasonably have come to the conclusions that it did."

That is the point I will seek to make good by reference to the evidence, the raw underlying evidence itself today. But I fully accept, as we said in our skeleton, the fact that the evidence might have supported alternative conclusions, the fact that reasonable people could disagree, to use the chairman's phrase, is not determinative

of unreasonableness in respect of the conclusion actually reached by the CMA.

To finish on this issue, if you go back to IBA in the Court of Appeal, that's the same authorities bundle, tab 12 this time. Tab 12, it begins at 486 and I would ask the tribunal to go to page 514. At paragraph 93, it's near the bottom of page 514 and starting halfway through paragraph 93 on 514:

"Under the present regime, the issue for the OFT is one of factual judgment. Although the question is expressed as depending on the subjective belief of the OFT, there's no doubt the court is entitled to enquire whether there was adequate material to support the conclusion."

And just turning over the page then and going down to paragraph 95, there is a reference to the House of Lords in the CCSU case and the passage from the CCSU that's indented I will read because it's referenced in the CMA's skeleton:

"Irrationality was defined as a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

That passage, of course, as I said, is cited in the CMA's skeleton against us. But then this:

"However, his reference to Edwards v Bairstow, the reference by Lord Diplock, was simply in relation to his view that irrationality could now stand on its own feet without resort to the inference of mistake of law. The actual decision in Edwards v Bairstow from where the word 'outrageous' came, could certainly not be described as outrageous in any sense, at least without gross unfairness to the tax commissioners who made it. The issue was whether a particular transaction was an adventure in the initial trade. The House of Lords accepted that it was an inference of fact and they found that the Commissioners' view was the only reasonable conclusion."

There was no need to actually find anything outrageous, despite the use of that term:

"The concluding remarks of Lord Radcliffe's speech are often overlooked."

It says there, Court of Appeal, at paragraph 96.

If you could skip down, please, in the next indented passage between G and H:

"The court is not a second opinion where there is a reasonable ground for the first but there is no reason to make a mystery about the subjects that the Commissioners deal with ..."

And I would say the CMA deals with:

"... or to invite the courts to impose any exceptional restraint on themselves because they are dealing with cases that arise out of facts found by [I would say] the CMA. Their duty [your duty] is no more than to examine those facts with a decent respect to the tribunal appeal point, and if you think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."

Finally, paragraph 100 on page 517, between B and C, beginning:

"However, the essential question was no different from that which would have faced a court dealing with the same subject matter [this is the essence of the test]. The question was whether the material relied on by the OFT could reasonably be regarded as dispelling the uncertainties highlighted by the issues letter."

Of course, IBA concerned a decision to refer, it wasn't a final SLC decision:

"That question was wholly suitable for evaluation by a court. It involved no policy or political judgment which would be inappropriate for the kind of review that I have just described."

So it's not simply a question of whether there is any evidence at all to support the CMA's conclusion, even in a rationality challenge. It's a proper part of your role to review for yourselves, the evidence base on which the CMA relies, to consider it as a whole and determine whether it's reasonably capable of supporting the ultimate SLC finding made.

THE CHAIR: In Tobii, I put it as any evidence of any probative value.

MR KENNELLY: Indeed.

THE CHAIR: It probably has the same effect.

MR KENNELLY: In my submission it does. The CMA, in its own skeleton, in a separate part, appears to accept that but I was concerned with the suggestions in the paragraphs I took you to, to dispel any notion there is anything inappropriate in the tribunal reviewing in full the evidence base that the CMA considered and asking the rationality question which is: is it reasonably capable -- is it evidence of probative value, capable of supporting the ultimate SLC finding?

I will turn now, if I may, to the merger assessment guidelines, the questions the CMA should have addressed in this case but failed to do so and that's in the fifth volume of authorities behind tab 56. Just to ground ourselves in the CMA's own guidelines. And it's behind tab 56, page 4014.

MR RIDYARD: Sorry, can you give that again?

MR KENNELLY: The fifth volume of authorities, sir, tab 56, page 4014. Authorities 4014. I will take you first, just to the heading. It's "Horizontal unilateral effects", and that's the basis for the SLC in this case. And over the page, page 4015, you see the next heading "Differentiated products", and plainly we are concerned in this case, as the CMA accepts, with differentiated products. If I could read you 4.6 down to 4.8:

"Unilateral effects may arise in differentiated product markets because a price increase becomes less costly when the products of the two firms are brought under common ownership or control. Absent the merger, firms face a trade-off when considering whether to raise prices or reduce quality, range or service. On the one hand, the firm will incur a cost because some customers will switch away and the firm will lose the profits that they would have earned on those customers; on the other hand, the firm also gains because it makes a bigger profit on the customers that remain

because of the higher price or the lower cost associated with reduced quality.

"The question is after the merger, it would no longer be as costly for the merged entity to raise prices or reduce quality. It would recoup the profit on recaptured sales from those customers who had switched to the products of the other merger firm."

Then this:

"In differentiated markets, horizontal unilateral effects are more likely where the merger firms are close competitors or where their products are close substitutes. The more closely the merger firms compete, the greater the likelihood of unilateral effects because the merged entity will recapture a more significant share of the sales lost in response to a price increase or other worsening in the offering, making the price rise more profitable. The merger firms need not be each other's closest competitors for unilateral effects to arise, it's sufficient that the merger firms compete closely and that the remaining competitive constraints are not sufficient to offset the loss of competition between them, resulting from the merger."

So these, the CMA agrees, are the basic requirements for analysis and these paragraphs are themselves cited in the Final Report.

We ask no more than that these tests are applied. The applicants are not, as the CMA says in its skeleton, laying down a highly prescriptive approach. The merger assessment guidelines themselves provide the approach and they tell the CMA that when examining whether a merged entity can raise prices more than the counterfactual, the CMA needs to do a basic, and it can be a very basic, cost benefit analysis. Will the likely downsides of raising prices outweigh the likely benefits?

Now in this case, the merged entity's conduct depends on what its customers, the retailers, will do. The SLC depends on the retailers threatening in a credible way to replace private label with Jus-Rol and vice versa, to secure better terms from Cérélia and Jus-Rol. So the CMA needs to ask, to see if that is a real and credible threat: if

the retailer did that, what would happen? What would happen to the retailer? Would the costs that the retailer saved by switching, switching from one to the other, outweigh the cost of upsetting its customers, who wanted to buy the product that had been replaced and would not buy the replacement product?

What about the supplier, who is supposed to be threatened by this possibility? Do they earn more or less profit if the retailer switches in whole or in part from private label to Jus-Rol and vice versa? In this case we say the CMA failed to ask these basic questions and I will turn then to the ground 1A itself. That's by way of background.

I would ask you now to go to the Final Report itself. The basic argument in ground 1A is that the evidence that I will show you is not reasonably capable of supporting the SLC finding. Before I get into the specific evidence itself, I will show you some background in the Final Report and then explain why those basic preliminary questions that I've mentioned just now are so important to the CMA's analysis.

So first in the Final Report, it's in the core bundle, tab 3 and if you go, please, to page 105. Here, by way of background, the Final Report -- and this is not controversial -- is setting out the distinction between private label and consumer brands. 5.12 -- actually, I would ask the Tribunal, perhaps, if you don't mind, to read this yourselves, to read paragraphs 5.12, 5.13 and 5.14 over the page. The last is useful because it tells you who are the four top grocery retailers and their market share.

MR RIDYARD: I am sorry, can you give me anyway, the electronic reference because I am struggling to follow that.

MR KENNELLY: Sorry, I don't have -- sorry, it says -- I am told it's core --

THE CHAIR: 105.

MR KENNELLY: Core 105.

MR RIDYARD: 105. Okay. I will get the paper one.

MR KENNELLY: That should work on the electronic bundle.

MR RIDYARD: It doesn't.

MR KENNELLY: We are encouraged not to use hard copy ones. I don't want to be party to a deviation from the tribunal's preference but ...

MR RIDYARD: I am with you.

MR KENNELLY: It's, as I said, behind tab 3, page 105. If you could read, as I say, paragraphs 5.12 to 5.14.

(Pause)

THE CHAIR: I have read that, yes.

MR KENNELLY: Now the supply process. It's in the same Final Report, this time page 139, from paragraph 7.18.

THE CHAIR: Where do you want me to go to?

MR KENNELLY: Page 139, sir.

THE CHAIR: I have 7.18.

MR KENNELLY: If you could read that down to 7.22, the bottom of 7.22. **(Pause)**

MR RIDYARD: In 7.21, it says "Wholesale prices are, to an extent, fixed." Are they fixed or are they not fixed?

MR KENNELLY: My understanding is they are generally fixed following those supply agreements but the volumes change, the volumes do change.

MR RIDYARD: I can see how the volumes might change but the wholesale prices, are they set in stone or not?

MR KENNELLY: I will have to -- there's usually a provision for exceptional circumstances, I am told. I don't see that in the Final Report. If there is a reference to it, we will dig it out.

But the two points that we take from -- I ask you to take from these two paragraphs, first of all, the tribunal has seen how easy it is for a retailer to switch from one private label supplier to another, to switch volumes from one to another. And that's very

relevant when we come to see how Cérélia is constrained by the fact that Bells and Henglein can step in easily and take private label volumes. But also the reference to the Grocery Supply Code of Practice, the GSCOP. There is a particular regulatory regime in play in this case and it means that when volumes are cut, written notice and reasons are required to be given. So you would expect a paper trail, if retailers were switching between private label and brand and vice versa.

So unusually in this case, there is a reason why one would expect, even to a greater degree, a paper trail, if the switching which the CMA depends upon actually occurred or is even threatened.

The next issue is differentiation and, again, I rely on findings made in the Final Report itself and for this, I would ask you to go to page 291, paragraph 9.335:

"We found the parties' offerings to retailers are differentiated and the constraint between them does not typically manifest itself through direct competitive interactions. In particular, through head to head competition in tenders."

Just pausing there, one sees straight away the unusual nature of this case and how novel it is in this respect. An SLC is found in a market where there is not, typically, direct competitive interaction. In particular, there's no example of head to head competition in tenders but the CMA says:

"This lack of direct competition reflects the nature of competition in the market in which a grocery retailer selects its preferred supplier within each of the distinct channels."

There's no doubt that within the channels, there's very, very strong, we say, competition but that's certainly where the competition mainly occurs, even on the CMA's case:

"For the reasons set out in earlier sections, an assessment limited to direct competition would not fully reflect the nature of competition in the market, in particular the competitive tension that exists between the PL and branded channels."

Then we find the core finding, the core finding at page 142. It's page 142 and paragraph -- we see first of all the heading, at the bottom of 142, "Cross channel competition", and that's just the heading. I take you to paragraph 7.34, if I may, over the page. I am going to take you in some detail to the core finding because there's some suggestion by the CMA in its defence that the SLC finding is not as narrow as we claim and so I want to take you to the detail in that core finding, so you can see precisely what they decided. I begin at 7.34, where the CMA finds:

"There's an ongoing process by which retailers select their optimal volume mix of PL and branded products best served their end customers and their commercial interests. We refer to this mechanism as rebalancing or flexing between PL and branded products."

Over the page at paragraph 7.35:

"DTB suppliers will consider the impact of their offering across PQRS on expected volumes which, in turn, drive profits. The supplier is therefore incentivised to provide the retailer with a good deal because if it does not, it raises prices too much or fails to develop new products, the retailer may switch to another supplier for that channel or, subsequently, allocate more shelf space to the other channel. For example, during a tender or renegotiation of a PL supplier's offering, the supplier is constrained not only by the risk it will be replaced by an alternative PL supplier but also by the prospect that if it remains a selected PL supplier, it may lose sales to the branded channel. As a result, there's competition between DTB suppliers not only within the PL and branded channels but also across the channels."

No evidence cited for that paragraph, the evidence that's relied on comes later. For that, I need to go to page 200. First the heading, "Our assessment." This is having set out the initial evidence in the preceding paragraphs, the CMA says this at 9.67. They note:

"The largest retailer customers of the parties overall articulated a broadly consistent and coherent view that there is an implicit but important constraint between the parties which will be lost as a result of the merger."

As I hope to show the tribunal, that is an irrational finding, based on the evidence I will show you. There is no broadly consistent and coherent view that this constraint is important but implicit.

Then at 9.70 over the page, page 201 -- this is following the tendering evidence, the CMA says:

"We have found that retailers' decisions about how much product to purchase across the two channels is not agreed as part of the tender process but is determined through ongoing discrete orders, where retailers can flex their demands between the private label and branded options. It is through this competition for retailer shelf space that the constraint between the parties occurs."

Then 9.152 on page 239. So page 239, please, 9.152:

"The evidence from third parties indicates the parties are close competitors. While some DTB suppliers were focused on within channel competition, third parties generally considered Cérélia and Jus-Rol to be competitors. The largest retailer customers of the parties [and I will be focusing on those two] that make up a large majority of the overall market, articulated a consistent and coherent view that there was an implicit but important constraint between the parties which will be lost as a result of the merger. In particular, they explained they value the ability to weigh up the parties' offerings across the PL and branded channels, in order to get a better deal in negotiations, particularly in terms of price and quality."

Again, to be absolutely clear, that's the constraint. It's not enough to simply be aware of the price in one channel and have that informed pricing, especially at a retail level in the other. They need to use their ability to switch between private label and Jus-Rol,

to negotiate better terms and services from Jus-Rol and Cérélia, the exercise of the constraint.

MR RIDYARD: Doesn't this switching happen at the retail level, depending on what price the retailer sells these products at to the consumer?

MR KENNELLY: There is a degree, and I will show you how much. Not as much as the CMA suggest but a degree of switching which is consumer driven and that happens and the retailers, as we'll see, respond to consumer preferences. The CMA's theory of harm is different. The CMA's theory of harm is not that the retailers buy more or less private label or Jus-Rol, based on their consumer preferences. Their SLC is based on a finding that in order to obtain better terms and services for the retailer, they can threaten, even implicitly, Jus-Rol and Cérélia to switch from one channel to the other. With that threat, they can obtain better terms and services from Jus-Rol and Cérélia and vice versa.

MR RIDYARD: Can we just unpick that a little bit because the merger guidelines that you took us to earlier give a nice clear account of what an SLC, in the classic case, looks like and it's really about, as described there, how the merger will change the incentives for one or both parties to raise price. That's why I asked you a minute ago about whether the private label contracts can change the price during the course of a contract because that seems to me, quite important.

The classic SLC story would be because of the merger, the merging firm has an incentive to raise price that it didn't have before the merger. So in the case of private label products, if we are saying that the prices are fixed for the duration of the contract, the only time at which you could exploit your newly gained market power, having done the merger, would be when there was a new contract, unless it was possible to change price during the contract.

So that seems quite an important sort of fact to understand. If it's possible to change

the price during the course of a contract, then I do a merger, I decide I have more market power, so I raise the price of my private label product. Then you might expect the retailer to say -- it might not be happy about it but let's say they accept it because they have no alternative for some reason -- they then reflect that in higher retail prices and then so when you and I, as consumers, go into the store, we find the price of private label has gone up and, therefore, we decide to maybe switch our purchases or divert our sales to another product, maybe the branded product. And that will be the normal mechanism in a retail setting, how an SLC happens. Are you saying the CMA is not describing that process, when it talks about the SLC?

MR KENNELLY: No, that's not the constraint the CMA is describing, that's not the constraint they identify in this case. And that's why I am focusing so much, before we get into the evidence, on the particular SLC they identify. They are very clear. The constraint upon which they base their case is a separate one which is that because they, the retailers, can switch volumes -- contracts, sure, but also volumes -- relatively easily out of private label and into brand, they use that ability to switch, as a negotiating tool, to get better terms from Cérélia, when they negotiate their contracts and Jus-Rol, when they negotiate with them.

MR RIDYARD: But if the supermarket has a fixed price from the private label supplier for the duration of the contract, then there's nothing to flex and no reason to do any flexing, is there? It's only when something bad happens, like a price rise happens, that the retailer might try and flex their muscles.

MR KENNELLY: First of all, they can exercise -- they can do it when the contract comes up for renewal and the tendering process which is where we'd expect to see this negotiating threat, if it existed in the tendering process but also in the volumes. They can say: we are going to switch out -- we have a price with you but we'll switch out volumes if you don't do something for us and we'll switch our volumes to a branded

product.

MR RIDYARD: But if the wholesale price has gone up and the retailer decides to reflect that in the retail price, then it's consumer choices that will change the volumes that are sold. It's not some independent thing the retailer does on a whim, it responds to what the consumer does when they go into the store.

MR KENNELLY: That's not what the CMA found. The CMA is not saying the supermarket is doing this, prompted by particular consumer choices, they are saying it's a negotiating lever that retailers can exercise for themselves in trying to get the best terms and conditions from Cérélia or Jus-Rol. The threat of switching from branded to private label and vice versa.

MR RIDYARD: I am sure Mr Palmer will come back on this in due course. Sorry to interrupt you, it's very helpful --

MR KENNELLY: No, it's absolutely central to our case because I am sure the CMA can come up with other theories which might be supported by the evidence. We don't see them, but we have to focus on the CMA's SLC finding in the decision.

9.152 and other paragraphs I have shown you are really clear. If you go to their overall conclusion at 291, so page 291, paragraph 9.336:

"Large grocery retailers have told us that their ability to trade off the parties in their negotiations ..."

So the negotiations are presumably the tenders for the private label contracts and the bilateral negotiations with Jus-Rol and other branded products. So in those negotiations, their ability to trade off Jus-Rol against Cérélia is an important constraint which enables them, the retailers, to get a better deal. They say for consumers but in the first instance, they are using this constraint to get a better deal, better pricing and services for the retailers at the wholesale level:

"Grocery retailers told us they may not typically pit their private label supplier against

their branded supplier but that it is a source of competitive tension that would be lost by the merger, thereby reducing their ability to protect against potential price rises by a particularly large supplier covering both supply chains."

Now the CMA says in its defence that the SLC finding isn't only based on this implicit rebalancing threat. But no other negotiating lever is suggested in the Final Report, apart from this threat, the threat to stock different products in order to get better terms and services from Cérélia and Jus-Rol.

Now my --

MR RIDYARD: Can I just try again, just to go through a sort of thought experiment here. So we get to the end of a private label contract and the supplier says -- which must be happening quite a lot these days: oh, sorry, my costs have gone up by 10 per cent, so I would like to carry on supplying you the private label but it's going to be 10 per cent higher. That's not good news for the supermarket, so it tries to push back on it, using whatever power it has. Would it not say: if you do that, you put through a 10 per cent price increase when this contract is renewed, I am obviously going to have to put up the retail price because I have to earn my living and that's going to lead some consumers to switch away from the private label product to something else, possibly the branded alternative. Therefore, I am going to end up buying less from you, if you do push through this price rise. So that would be where you might expect a normal commercial negotiation. I am sure the actual negotiations are much more lively than that but that would be the basis of that negotiation. The retailer would say: because your price is going up, I'm going to have to reflect it in my downstream retail prices and that's going to lose you volumes, so don't raise by 10 per cent, please, raise it by five.

MR KENNELLY: Indeed, but again, that's not the analysis that the CMA did. That's not the way the constraint works in the SLC finding the CMA made.

MR RIDYARD: But you see, sorry, in that story, the retailer would be going back to the supplier, saying: you are going to lose volume if you push through that price rise. The reason for that is something that's going to happen downstream but the retailer doesn't necessarily have to go through that with the wholesale supplier, it's just saying: if you raise price, you'll lose volume. So are they not sort of flexing volumes between the private label and the branded channel in this made up negotiation that I just described?

MR KENNELLY: In that negotiation, yes, but it's not the constraint that the CMA identified.

I mean imagine a Jus-Rol product, again a thought experiment, sold to retailers for 60P and it sells well at £1. If Jus-Rol raises the wholesale price to 70P, the retailer will lose margin, just as you described to me, sir, so what can the retailer do? It can absorb the price increase and do nothing and it will retain sales but lose margin. It could pass on the price increase. It could make the retail price 1.10, with consequences for consumers which I think is what you put to me. But then it could do these things and this is what the CMA focuses on. It could de-list the product across its complete store portfolio, it could de-list the product across some of its store portfolio or give the product fewer shelf inches in the stores where it's stocked.

Those last three options are the ones the CMA focuses on.

THE CHAIR: On that last option they can say: well, look, if you are going to increase the price, let's say of Jus-Rol, they will say: well because you are going to increase that price, we are going to have to increase our own price. Consumers will buy less of it, they will buy more or our PL product, and so you are going to get less shelf space. So the retailer itself could be looking at what it thinks a consumer is likely to do in reaction to a price increase.

MR KENNELLY: Indeed, and that's --

THE CHAIR: So what then happens is the retailer is not only just looking at the position as between the two parties, but it's looking at the competition on the retail side in order to make decisions as to how much product it's going to take.

MR KENNELLY: Indeed. There are two things, two points to make about that, sir. The first is the tribunal's assuming a high level of consumer diversion between private label and --

MR RIDYARD: Just some.

MR KENNELLY: We'll come to how much there is. There's far less than you might think. That question of how much diversion there was between them is a question the CMA could well have asked but didn't and that's my second point. The analysis that the tribunal is undertaking is not one the CMA undertook. The CMA's analysis is much more crude. It was the very one I have shown you which is that without getting into ultimate consumer reaction or working out, as I say, the cost benefit analysis, how consumers react, will this negotiating tool ultimately benefit or not benefit the retailer who is doing it? The CMA is not looking at any of that. They are simply saying the fact of cross channel switching is a negotiating lever that the retailers use against Cérélia and Jus-Rol, to get better terms for themselves, full stop.

They, the CMA, did not say: let's look at the diversion ratios and work out what a constraint might be, where retailers would say: our consumers are likely to divert, you will lose shelf space, therefore you have to change your price or offer special services in order to offset this likely ultimate consumer reaction. That was not the constraint they identified.

THE CHAIR: What's the CMA's case within each channel? So if Cérélia is saying: on the PL side, we are going to increase the price by 15 per cent, the retailer could say: okay, we'll just go to someone else for that.

MR KENNELLY: The CMA's case is competition within the PL channel is weak. They

say the rivals don't have --

THE CHAIR: Enough capacity.

MR KENNELLY: Lack of capacity, lack of reputation in the market, lack of willingness and we'll come to that. That, as I said in my opening, that's my fallback. It's a very important fallback which is even if I am wrong about the implicit rebalancing threat, there's this other massive constraint on Cérélia. Cérélia can't raise private label prices because there are rivals with very large spare capacity, producing quite homogenous product that will come in and take their market share. The CMA relies on the fact Cérélia currently has a big market share for PL supply but that's not the question in a bidding market, the question is what spare capacity do its rivals have? I will come to that after -- you may have to wait quite a long time, sir, for me to get to that issue because I need --

THE CHAIR: I don't want to take you out of your natural order, that's fine.

MR KENNELLY: So if I may come back to the point.

THE CHAIR: Yes.

MR KENNELLY: The real failure, and this is the point I made in opening, the CMA fails to answer those basic questions that the merger guidelines prompt which is: did the retailers have the ability and incentive to carry out this implicit rebalancing threat by reference to their own customers, the very discussion we've been having. Even if they did, would that threat have been effective against Cérélia, the point you raised with me because, in fact, apart from the threat from the suppliers, was Cérélia indifferent as to whether they stocked private label or Jus-Rol because Cérélia was manufacturing for both.

That's the first question and I have three. I am taking my challenge in three ways. The second is the retailer evidence and internal documents can't reasonably support the SLC finding. So my first point is they failed to ask those basic questions I have been

discussing with the tribunal. The second is, in any event, the evidence does not reasonably support the SLC finding. Third, even if the implicit rebalancing threat existed, the merged entity couldn't raise prices or reduce quality because, as I say, Bells and Henglein would step in and constrain it.

So I want to go first, before I get into the evidence, to the basic economic analysis which the CMA, we say, failed to undertake and that, I think, goes directly to the points Mr Ridyard has been raising with me, the ability of retailers to exercise this threat.

I will go first to the finding in the Final Report. It's in the core bundle again, tab 3, page 157.

I see the time. Are we stopping for a shorthand writer break?

THE CHAIR: We will do but we'll do it -- how long is this next point going to take?

MR KENNELLY: Probably about 15 minutes.

THE CHAIR: Okay, we'll take our break now then.

(11.36 am)

(A short break)

(11.50 am)

MR KENNELLY: I am, as I said, approaching the challenge to the SLC in three different ways. I am beginning with the basic questions about what the retailers have by way of ability and incentive to carry out this implicit rebalancing threat, and that's an exercise we say the CMA did not undertake. I think that's the very question that has been put to me by Mr Ridyard before we broke, and in his thought experiment the retailers were undertaking this kind of cost benefit analysis, based on their own diversion prediction.

MR RIDYARD: Based on what was happening when they were selling the products in the store.

MR KENNELLY: Precisely. As I hope to explain in this section, even on that thought

experiment, even if that were the constraint which the CMA identified which they didn't, it still wouldn't be, on the evidence before you, a credible threat because of what you'll see in relation to consumer preference and consumer diversion, that for the retailers to de-list which they need to threaten credibly to do, they'd end up losing significant customers entirely.

THE CHAIR: Can you just give me the cross-reference to where you are in your skeleton?

MR KENNELLY: That's very difficult for me.

THE CHAIR: I know you're working from your notes, I appreciate that.

MR KENNELLY: I am on ground 1A and I am in my skeleton -- I don't know if this is the very beginning of ground 1A. Paragraph 15. I am tracking the same structure in my skeleton, this is not completely different.

THE CHAIR: No.

MR KENNELLY: First part of the ground 1A challenge. I am asking the tribunal to go to the Final Report, paragraph 7.90.

THE CHAIR: Yes.

MR KENNELLY: This is the core finding I challenge. 7.90:

"Switching from existing suppliers. Rather than switch to a new supplier, retailers may choose to switch volumes between existing suppliers. Since supply agreements typically do not specify the volumes to be purchased, this can be varied at short notice, assuming suppliers don't have capacity constraints."

And this:

"Switching volumes between existing suppliers is likely to be relatively easy and costless."

Relatively easy and costless to switch.

But then the CMA finds that:

"For private label [next paragraph], retailers normally have one existing supplier and for branded, one existing supplier, so that when it finds that switching between existing suppliers is easy and costless, it's referring to switching between private label and Jus-Rol."

You see that at paragraph 7.91:

"Such switching could take place within the PL or branded channels if retailers use more than one supplier. However, as we set out above, it's unusual for retailers to have more than one supplier for a given DTB product type in each channel. Switching volumes between existing DTB suppliers therefore would typically occur across the PL and branded channels through the rebalancing or flexing mechanism described above."

And it is that switching, therefore, that the CMA is describing as relatively easy and costless.

Now as a matter of contract, it's common ground that a retailer can change volumes relatively easily, as we were discussing earlier. I rely on that to show how Cérélia is constrained by Bells and Henglein if they want to have two PL suppliers. But what about the retailers' customers? Whether, in reality, it's easy and costless for the retailer to switch from private label to Jus-Rol and that depends on how the retailers' customers react which is the very discussion I was having with Mr Ridyard and that's a question the CMA never addressed and it needed to be asked because of the other finding the CMA made.

If you go to 7.8 in the same Final Report, 7.8, "Grocery retailers' purchasing decisions", you'll see what they say here:

"Grocery retailers' purchasing decisions are informed by what their customers, end consumers, want to buy."

THE CHAIR: Sorry, what paragraph are we on?

MR KENNELLY: 7.8 on page 137.

THE CHAIR: Yes.

MR KENNELLY: One retailer commented:

"Our start place for ranging decisions is coming from a position of how do we best serve the needs of our customers."

Another retailer:

"And our decisions on which products we sell in which stores are customer and category led."

I will rely on that later:

"Grocery retailers are responsive to the demand preferences of their end consumers, based on the quantities of DTB products being bought at the retail level and retailers respond to these retail demand preferences by purchasing more or less of the products at the wholesale level."

That's not controversial and corroborated by third party evidence. As one said:

"If there's more volume, if there's demand on one line, you buy more of it as a result of that."

Then 7.11 on page 138:

"Customers want choice."

This is obviously material to the ease with which retailers can de-list products.

7.11:

"The large retailers, the big four, generally choose to stock both branded and PL DTB products to give end consumers more choice. They offer the cheaper one as an entry point to the category and branded DTB products offer a wider range but at a higher price point."

And one of their retailers confirms that by saying:

"Customers want a choice of products at appropriate and reasonable price points."

There's no question that Jus-Rol is more expensive. You'll see that customers can't be expected to switch easily to the more expensive product and as you'll see, many Jus-Rol customers will not switch to private label. For that, if you go to the findings again in the Final Report itself at page 229 on paragraph 9.120:

"While private label products are sold for lower price points, branded products such as Jus-Rol are typically sold for a higher price. The willingness to pay this brand premium indicates that some end consumers consider branded products to be of a higher quality than the equivalent PL products. Other reasons for the willingness to pay the brand premium may be that consumers value the quality assurances provided by brands, the more exciting packaging, new recipes and use suggestions."

Putting those findings to one side, we come to look at the underlying documents themselves.

The reason I am taking you to these, as I said a moment ago, is to show that it's very far from easy and costless for a retailer to switch between private label and Jus-Rol which is obviously an important question that one asks, if one is asking whether this alleged constraint is credible or not.

So I would ask you to go first to the parties' disclosure bundle, the second volume, tab 58. This is a Jus-Rol document. Go, please, to page 1035. It's from March 2020.

MR RIDYARD: Sorry, we are in disclosure bundle; yes?

MR KENNELLY: Yes, the parties' disclosure bundle, PDB bundle.

THE CHAIR: What page?

MR KENNELLY: 1035.

THE CHAIR: Okay, I have it. I will work from the hard copy. I can't find it on ...

MR KENNELLY: It may be, sir, because there's MDB and PDB.

THE CHAIR: Probably. Let me -- so what do I get, which one?

MR KENNELLY: PDB, parties' disclosure bundle, volume 2.

THE CHAIR: Yes.

MR KENNELLY: And it's behind tab 58, page 1035. We are looking at, from Jus-Rol's perspective, substitutability within the chilled pastry and dough category. I am focusing on switching, the top half of that table in front of you and I am looking at the yellow comment box on the right-hand side. That yellow comment box tells you what percentage of shoppers will switch brand if their favoured product is not available. Brand for these purposes includes Jus-Rol and private label brands.

MR RIDYARD: How do we know that?

MR KENNELLY: Because in the top of this table, when we are asking about diversion, there's nothing else that covers diversion to private label. The top half of this table is looking at switching and there's no other way -- unless they are saying nobody switches from Jus-Rol to private label, it wouldn't be covered.

The rest of this presentation which is very long, suggests that private label -- in fact, if you look at the page immediately before it, private label is behaving like a brand. Do you see the 1034, right-hand side? My main point is I don't think this table at 1035 can be understood unless brand means Jus-Rol, other brands and private label.

The important point is it tells you the percentage of shoppers that would switch to another brand or private label if the Jus-Rol product was not available. This is very revealing because if you subtract that percentage that you see in the orange comment box from 100 per cent, then you have the percentage of shoppers that will not buy either another brand or private label if Jus-Rol isn't available. They won't buy any dough-to-bake product at all.

Those are --

MR CUTTING: Sorry, can you say that again. What's your proposition?

MR KENNELLY: The proposition is that the percentage you see, the percentage stated in the yellow block, is the percentage of shoppers that will buy -- in my

submission, if Jus-Rol isn't available, they will buy a rival brand like Northern Dough or a private label brand. But if Jus-Rol isn't available, if you subtract that number from 100, you have a larger number which is the percentage that will not buy any dough-to-bake product in the chilled pastry and dough category. They simply won't buy it.

MR CUTTING: I am sorry, obviously I don't know your survey but even on that slide, it's 43 per cent walk away. Some of those go to another store, so they may have bought. They may actually be so loyal to your product that they go to another store to buy it.

MR KENNELLY: Yes.

MR CUTTING: So I don't see how -- because you are trying to support the proposition that 70 per cent loyalty, effectively -- I am not sure even your slide says that.

MR KENNELLY: No, no, sorry, I am describing people who won't buy in that store. These are the shoppers who won't buy dough-to-bake product in the store they are in. So in the top half of the table -- this is why I said to Mr Ridyard I am inferring that brand means Jus-Rol and the private label.

MR CUTTING: Yes.

MR KENNELLY: Top half of the table, "Bought and size amount, bought another type or flavour", those are the switchers -- sorry, they are the people who are buying other sizes or amounts of the Jus-Rol product and the type and flavour of the Jus-Rol product and then at the bottom are the brand, the people who are buying either another -- if Jus-Rol is not available at all, another brand or, I infer, private label because otherwise switching to private label isn't covered at the top of this table.

Do you see? I appreciate the word "brand" is confusing here but we are discussing switching in the top half of this table and bought another size or amount, bought another type or flavour, is Jus-Rol, so bought another brand must be switching to either

Jus-Rol or private label, because otherwise, switching to private label isn't covered.

Now I am not seeking to argue that this percentage figure is determinative. I am not inviting you to make a finding this is the right number. I will show you some other numbers. The CMA never analysed diversion between private label and Jus-Rol within the stores, in the way that diversion is often examined by the CMA.

The point here is if this is right, one sees a significant loss by the retailer of customers who would otherwise buy a dough-to-bake product because their favoured product isn't available.

Now the CMA points to lower percentages of those Jus-Rol customers who would not buy private label and they rely on a different document. I will show you that now. It's in the same volume but this time tab 67.

THE CHAIR: So you are saying someone turns up, they have in their mind they want to buy a particular product and if it's not in the supermarket, 43 per cent of those people will just go somewhere else or not buy at all?

MR KENNELLY: I am not saying numbers --

THE CHAIR: The retailer doesn't get the sale at all.

MR KENNELLY: The retailer doesn't get the sale.

THE CHAIR: At all?

MR KENNELLY: At all. That retailer does not get a dough-to-bake sale at all.

THE CHAIR: At all, I know, because 43 per cent will say: if the product I wanted to buy is not available, I am just going to walk out and buy it somewhere else or not buy it at all, buy it another day.

MR KENNELLY: Sorry, not 43 per cent, I am talking about people who -- the top half of the table --

THE CHAIR: I am looking at the second half.

MR KENNELLY: The second half, sorry, yes, they will walk away entirely.

THE CHAIR: So the retailer won't have a sale at all?

MR KENNELLY: Yes.

MR RIDYARD: But that's not what this says, is it, because it's only a very small number who go to another store. Some go hungry and buy nothing, some buy something else in the store. It's quite complicated, isn't it?

MR KENNELLY: It's not that -- Mr Ridyard is right, so walk away, how that's split up, 5 per cent go to another store -- again, these figures are confidential, so my understanding is this whole document is confidential.

MR PALMER: It's your document.

MR KENNELLY: Okay. Well, no, it is confidential, so I am not saying numbers.

THE CHAIR: So whose document is this?

MR KENNELLY: It's GMI's document, a Jus-Rol document. But, hopefully, we can manage. There aren't many numbers. The walk away figure that's being quoted is split between going into another store, and Mr Ridyard correctly points out, buying something else instead of the category. So buying something that isn't chilled pastry and dough, there is a percentage for that. But some people buy nothing and then others will say they will: buy it on my next trip, but that's still a walking away.

So you have my primary submission on the people who won't buy a dough-to-bake product at all in that bottom of the brand bar. I also rely on the walk away figures because that also demonstrates what happens if the Jus-Rol product isn't available. This whole slide is demonstrating the costs that a retailer incurs if it de-lists a product that's favoured by the consumer. Far from being costless and easy, de-listing is difficult and expensive and upsets customers and if you go to the document the CMA relies on --

MR MALEK: It does not have to be all or nothing because he can reduce the volume, can't he?

MR KENNELLY: Yes, he can.

MR MALEK: Have less shelf space, so the product may still be available but just in --

MR KENNELLY: He can but the reason why I am emphasising this is because I am setting the scene before I come to the evidence.

THE CHAIR: Okay.

MR KENNELLY: The CMA says the switching is easy and costless between Jus-Rol and Cérélia, in order to tee up the evidence for its theory of harm. My point is if you look at the consumer preferences and the retailers' attitudes, it's very far from easy and costless to switch between Jus-Rol and private label. It means that it's counter-intuitive to expect them to threaten Jus-Rol and Cérélia with the kind of switching that the CMA says is easy and costless.

MR RIDYARD: That's one thing that was noticeable in your skeleton. You put a lot of emphasis on de-listing as the threat but isn't the threat to just change my proportions between private label and branded products, you know, from 70/30 to 60/40? You could do that. That's still harming -- a threat to the supplier but it doesn't require me to de-list. Why do you put so much emphasis on de-listing? Is that crucial to the CMA's case?

MR KENNELLY: No -- it isn't and because the point is it's about de-listing but also reducing volumes. If you reduce -- if the shelf space contains less of a product the consumer wants, my point is still good, the consumer is still less likely to get the product that he or she wants and if it isn't available -- that lack of availability can result from de-listing but also from reduced volumes and these consequences follow.

The important point is there's no evidence at all as to how these de-listing or volume reduction decisions impact retailer sales. It's not there, it's a basic question the CMA could have asked and should have asked in order to make good this theory and it's just not there. It's far from intuitive and we'll come to the documents -- you have this

document and I will come now to the document the CMA relies on. Because it's not just de-listing, the problem arises both with de-listing and reduced volumes.

The next document, as I said, is the same PDB volume 2, behind tab 67, page 1311. This is an email. It's from a retailer to Jus-Rol. I am looking at the word "Substitutability", the heading of "Substitutability", near the bottom of 1311. Now you see the word "range" in that paragraph. There is a dispute between the CMA and ourselves whether that means Jus-Rol range or includes the retailers' private label range but even if it means private label, if you subtract those percentages from 100 that you see, you have the customers that will not buy any dough-to-bake product if Jus-Rol isn't available because those figures describe switching. But then one subtracts those figures from 100 per cent and one has substantial percentage of customers that will not switch to another product in the range or to a JR sheet. So the retailer will lose those customers in this category.

These are, without doubt, costs of forcing Jus-Rol customers to buy private label. So we are looking at diversion from Jus-Rol to private label. But what about the costs of forcing private label customers to buy more Jus-Rol.

MR RIDYARD: It's just this use of the term "forcing". How does the retailer force the customer to do anything?

MR KENNELLY: It's because what is constraining the retailer. The CMA's theory is that the retailer says to Jus-Rol and Cérélia: you need to give us better terms and conditions, better quality or lower prices, otherwise we will switch volumes away from you to Jus-Rol. It's not enough simply to say you are (inaudible) compared to them, there has to be a threat to switch from one to the other. How credible is that threat, in circumstances where customers will not buy the replaced product in significant numbers? For that threat to be credible, the CMA needs to analyse the analysis the retailers would do before making that threat. The threat is no use if it's a bluff, the

retailers have to calculate: if we reduce volumes or de-list for this product, what will the costs be, how will we lose customers? Because the CMA's case is not the retailers go to Jus-Rol and Cérélia and say: our customers think you are a bit expensive or don't like your quality and they are shifting in numbers and therefore you need to change your price or quality. That's not the thesis. The thesis, as you saw in the Final Report, it's a negotiating lever which the supermarkets can use to get better terms and conditions from Jus-Rol and Cérélia. The threat they can switch easily and costlessly from one to the other.

MR RIDYARD: Surely the CMA's basic thesis is that the merger will lead to an SLC which is most easily thought of as a price rise. It's a prediction that because of the merger, Cérélia will increase the price of either the private label or the branded product or both, and the analysis the CMA does is to say: we think that the post-merger firm will have more incentive to raise price than the pre-merger firm did. And the reason for that is because some of the sales that we would pre-merger lose to some other entity, we will now capture because some of those sales are diverted back to us and that's the thing that creates an SLC, isn't it?

MR KENNELLY: That is the broad guideline in the MAGs but that's not the constraint. The CMA have said there's a risk that prices will increase compared to the counterfactual because this implicit replacement threat will be lost. The CMA's SLC is a very narrow finding. They've said the reason why prices will go up is because retailers will no longer be able to say to Jus-Rol and Cérélia: if you don't give us lower prices or better quality, we will switch from private label to branded and vice versa. That is why I am focusing on the constraint. That's the constraint they find and that's the basis of the SLC. They say: when that's removed, there is a risk that prices will increase.

It's just not a real constraint. It's not there. Before we get into the evidence itself, you

can see why it's not there because retailers cannot credibly threaten to switch in that way without assessing, first, the costs of losing or upsetting customers if the products they want aren't available. I am showing you the analysis the CMA hasn't done, before we get to the evidence itself.

Mr Ridyard, the point -- you are absolutely right, there is a broad thesis which could ground an SLC but it's not what the CMA found and it wouldn't be supported by these facts in any event because what you see in the evidence, when I come to it, is that customers have preferences and that's what drives the retailers' decisions and there's no realistic constraint between Jus-Rol and Cérélia. They are not competing in the way that the CMA describes, so there's no customer harm. For that reason, there's no constraint which will be lost and prices will not be increased and in any event, there's excess capacity in the PL market which I will come to now.

MR RIDYARD: I understand that point but just to press you on that, you are saying the parties' products don't compete or -- I mean surely they do compete to some extent at the retail level?

MR KENNELLY: At the retail level, there's some competition. That's common ground. The question though, for us is, what is the competition at the wholesale level? From the retailers' perspective, to what extent is Cérélia competing with Jus-Rol and what constraint do they exercise on each other? If the constraint is there, if it's a significant one and it's removed, the CMA can show its SLC finding. But if there's no real constraint between them, then its removal will have no impact on competition and prices going forward.

MR RIDYARD: But when CMA talks about the implicit threat and they do talk about derived demand, doesn't that incorporate an idea that what matters is what happens downstream at the retail level but it gets fed through to the wholesale level from the retail decisions?

MR KENNELLY: No analysis at all of what's happening at the retail level. They talk about drive demand but, again, in a very crude way. There's no analysis that retailers would do this examination and say: we will be better off even if some of our customers don't get the product they want because we'll get better prices from Jus-Rol or Cérélia. There's no analysis of that at all. There's no analysis of diversion or impact on sales at the retailer level.

The constraint is as crude as I described it and that's why the SLC can't stand. It's important the tribunal doesn't project into the decision, an analysis that's not there.

MR RIDYARD: No, understood.

MR KENNELLY: This document again indicates potential diversion and the lack of an easy and costless route to this implicit replacement threat.

The next document I want to take you to is on page -- it's in the MDB bundle, the CMA's disclosure bundle. Now we are looking at the costs of encouraging -- I won't use "forcing" but encouraging customers to buy more Jus-Rol. So if the threat is credible, the retailers have to think: well if we are going to have more volumes of Jus-Rol for our private label customers, what impact will that have? So let's see what the evidence says about that.

I go first to the second MDB volume, tab 105. This is notes of a hearing. It's one of the retailers. Page 875. If you go to page 883, we are focusing here, now, on the costs of encouraging --

MR RIDYARD: Sorry, I am lost on where we are.

MR KENNELLY: Sorry, it's in MDB, the March disclosure bundle, volume 2, tab 105.

MR RIDYARD: Sorry, disclosure bundles 1 and 2?

THE CHAIR: It's the CMA disclosure bundle.

MR RIDYARD: Sorry, I am slow.

THE CHAIR: What page are you on?

MR KENNELLY: I am on page 883.

MR PALMER: The point I rose to make is that the bundle we provided at the end of last week contains the selection of documents which we are both most likely to refer to from the March disclosure bundles. Only referring to the version in that bundle won't automatically show the tribunal, as well as the advocates, which bits are sensitive from a confidentiality point of view and which bits are less so. So I am just encouraging, just because there might be questions from the tribunal about some of the contents of these documents, use of the bundle which has been specifically prepared --

THE CHAIR: On 883 there's no issue.

MR PALMER: Not on that one page, no.

MR KENNELLY: I will warn the tribunal when we come to it and I will be very careful myself to -- the problem with using the bundle that Mr Palmer indicates is it contains extracts of documents and unless it's going to be -- well we'll see.

THE CHAIR: We'll see how it goes. Don't worry, that's fine.

MR KENNELLY: Page 883 and I will ask the tribunal to read from line 2 to the end of 883, actually, and then I will make my points.

THE CHAIR: Yes.

MR KENNELLY: Thank you. **(Pause)**

What I take from this is the comment given by the retailer at the end of page 883, that it is more difficult, the options are more limited to encourage own brand customers to buy Jus-Rol because of the price issue. Private label is the entry price point into the range.

So you can't as easily impact sales of own brand. You can't steer the private label customers into Jus-Rol because of the price point.

Then in the same bundle, tab 84.

THE CHAIR: But they can pull back on own label, can't they, as per the last two lines

from the end?

MR KENNELLY: You can reduce own label volumes, yes.

THE CHAIR: Yes.

MR KENNELLY: But customers -- it's very difficult to steer them into a more expensive product because they want to buy the cheaper product. It's extremely intuitive and so what they are saying there is -- remember, the point is, is it easy and costless for retailers to switch between them? They are making the obvious point in response to the CMA's questions, that their options are limited in steering customers from the cheap private label product into the more expensive and has a significant premium, Jus-Rol product.

We see that again behind tab 84, the same bundle, page 652, at the beginning, a further discussion with the same retailer. And paragraph 12. This is making a slightly different point but it's the point about:

"This retailer is unlikely to consider de-listing a product that's important to customers or reducing the volume of product stocked. They can prioritise products but, ultimately, the decision is formed by the importance of a particular product to customers and the impact on profitability of carrying that product. But if it's important to customers, the retailer is unlikely to consider even reducing the volume of the product stocked."

If you go now to the third volume, third volume of the CMA's disclosure, tab 113.

THE CHAIR: Can we not just use this volume or not, the one we have open already?

MR KENNELLY: No, it's a different volume, sorry, sir.

MR PALMER: It's in the single --

THE CHAIR: If you have tab --

MR PALMER: (Inaudible due to overspeaking) mark-up and refer back. Rather than, in the process of writing a judgment, having to cross-refer to another bundle to see what is confidential --

THE CHAIR: If it's in this bundle, then I'd prefer --

MR PALMER: -- it's better just to use this single volume. It's the same page numbers.

THE CHAIR: If it's the same page number, then it should be fine.

MR KENNELLY: I am happy to give you -- it doesn't matter to me, sorry, because it is whatever is the most convenient to the tribunal. It's on page 982, at the beginning of the page. It's the same tab at 113 and page 996. So one sees the question from the CMA at line 6.

THE CHAIR: Sorry, let me make sure I have the right page. What page?

MR KENNELLY: 996, sir. It's a different retailer this time and the question is being asked between lines 6 and line 13. The answer I rely on until line 22.

(Pause)

The core point here is, is it easy and costless for the retailers to switch between private label and Jus-Rol, in order to make their negotiating threat credible, when they are negotiating with Jus-Rol and Cérélia to say: we'll switch away from you and get more volumes with Jus-Rol. Is it easy and costless? No. Three main points arise from the documents I have shown you. The first is, for Jus-Rol customers who are faced with private label products, a significant proportion will not buy them. For private label customers who are facing Jus-Rol products because their product isn't available because of a lack of volume, reduced volumes or de-listing, the private label customer is unwilling to buy the more expensive Jus-Rol product. They have limited options to steer their customers that way. What is paramount? What the customers themselves want. Do they want the cheaper private label product or do they want the premium brand? That's what drives the retailers' decisions first and foremost and that's what informs whether it's easy and costless for them, as a negotiating lever, to say to Cérélia or Jus-Rol: we will stock less of your stuff unless you give us better prices.

Everyone knows that the primary question is customers buying what they want and

the customer reactions if the product they want isn't on the shelf, whether because of de-listing or reduced volumes and that informs whether it's a realistic constraint or not. The next question that the CMA failed to address is would this alleged implicit threat even be effective? Because, remember, Cérélia are supplying both the private label retailers and manufacturing for Jus-Rol. If Cérélia's margins are similar for both, what does it care if a particular retailer stocks more of a private label and less of Jus-Rol or vice versa? And that's an important question in asking: is this implicit rebalancing threat even credible, if it's being made towards Cérélia?

For that, we go to the core bundle, back to the Final Report, page 235. Before I get into the paragraph, just to recall the questions I said, it's whether the alleged rebalancing threat that the retailers are supposed to have is credible. Do the retailers think it will be effective to compel Cérélia and Jus-Rol. And we look at paragraph 9 in the Final Report, the finding of the CMA. Paragraph 9.40 and 9.40A. You see Cérélia's submission about its view on this question. The CMA says:

"We consider the position is not fully supported by the underlying evidence."

The CMA quotes the information provided by -- based on the information provided by Cérélia, we see the CMA's finding about margins. I would ask you to read down to the end of (a). **(Pause)**

So there is evidence they have already about the similarity of the margins that Cérélia charges. There is a reference there to a preference. But even if Cérélia preferred private label because of a margin difference, how realistic, again, is it that retailers will say -- because if there's any point about margin difference at all against us, it's: well there might be a preference for a private label, but how realistic is it that retailers will say: give us better terms, Cérélia, or we will encourage our customers to buy more Jus-Rol?

We have seen how hard it is for retailers to force or encourage or whatever the word

is, their private label customers to buy Jus-Rol. If you go to page 307, this is the post-merger analysis, at 9.388, the CMA acknowledges the point:

"We also acknowledge that if manufacturing margins are similar across private label and branded channels or a larger branded channel, it would appear, in theory, to not make economic sense for the merged entity to degrade the Jus-Rol channel for its merger, if the expectation were that customers would divert from Jus-Rol to private label in response. Under these conditions, the margin on any sales recaptured in their private label channel will be offset by the loss of the manufacturing margin in the branded channel. However, an incentive to degrade the Jus-Rol offering could be present if the manufacturing margin in the private label channel was greater than in the branded channel."

Now paragraph 9.389, next paragraph, the CMA fails to make a definitive finding on the margins. You see what the CMA says about the margin data. The CMA says:

"We can't consider we can fully rely on the current margin data in order to assess the parties' incentives. However ..."

And this is an important acknowledgment, the tribunal can read that:

"... even for the case about the manufacturing margin, the incentive for the merged entity to divert sales from the more profitable branded channel which benefits from the Jus-Rol brand to the private label, is likely to be limited."

So in any event, the CMA itself finds there's only limited incentive to degrade Jus-Rol to increase private label sales. So we have findings here that the merged entity doesn't have a material incentive to drive customers from Jus-Rol to private label which is what we've just seen and we know, and it's obvious, that retailers cannot realistically drive customers from private label to Jus-Rol. So what is left? And we see it at 9.390:

"On the other hand, we note that even if the incentive for the merged entity to degrade

the Jus-Rol product relative to the private label channel post-merger is limited, there is still some loss of constraint on Jus-Rol in the branded channel because pre-merger, Jus-Rol was ambiguously worse off, if grocery retailers switched to the private label and Jus-Rol was under a competitive pressure to ensure its offering remained attractive, relative to anything in the private label channel."

So the CMA's case ultimately hangs on this pre-merger constraint on Jus-Rol because they have not shown -- and I will come to it, any constraint on Cérélia.

So before we get into the evidence itself, the retailer evidence, the landscape is like this: the CMA could see the retailer stocked private label and branded products, primarily based on the customers' preferences. Customers wanted both. Diversion between private label and Jus-Rol was potentially not strong at all but the extent of diversion was not investigated. They could see that substantial numbers of customers would buy nothing in the category, in the dough-to-bake category, if Jus-Rol product was unavailable and retailer stressed the difficulty in getting customers to switch from the cheaper private label to the more expensive Jus-Rol. And Cérélia itself appeared to be materially indifferent as to whether retailers sold more or less private label or Jus-Rol. The CMA has not established otherwise.

So in those circumstances, it's highly unlikely that this implicit threat to divert volumes between channels was real. It cried out for compelling evidence. One would expect any actual rebalancing between channels arising from a threat like this to be documented, not least because of the regulatory regime mentioned. And before we get into the evidence, I will quickly show you that need for documentation. It goes to how unlikely it is that if the threat existed, there would be such an absence of documentary proof.

That is in the authorities bundle, the fifth volume, A5, tab 61. This is the Grocery Supply Code of Practice.

THE CHAIR: Can you give us the reference.

MR KENNELLY: I am sorry, in the fifth volume of authorities. A, authorities 4086 and the paragraph I rely on is on authorities 4095. It's paragraph 16, the duties in relation to de-listing.

I am looking in particular at subparagraph 2:

"Prior to de-listing a supplier, a retailer must provide notice to the supplier, including written reasons."

And the second bullet:

"Inform the supplier of its right to have the decision reviewed by a senior buyer."

So this is, of course, about de-listing, not about changing volumes. But in substance, it creates a regime where retailer can effectively threaten a supplier by saying: we will de-list you, here is your notice. You've got a chance to have the decision reviewed, so it's not a final decision, by a senior buyer and, of course, in that review discussion, it's possible for the supplier to say: we can give you better terms, we can change our offering before you de-list.

So if de-listing was being threatened, we would see this regulatory regime reflected in documents and we do, to a very limited extent.

Sorry, the definition of de-listing includes a change of volume. 4089. Sorry, "de-list means to cease to purchase or significantly to reduce the volumes" -- I am very grateful to Ms Berridge:

"... for significantly to reduce the volume of purchases made from that supplier."

MR RIDYARD: That's really confusing to me. So if you've got a contract with a private label supplier to supply product X at 10P a unit and it turns out that product becomes more or less successful from one month to the next, are you saying that this code requires the retailer to go back to the supplier, saying: oh, your volumes have increased or decreased by more than 10 per cent, this firm, I've got to trigger this

process, this de-listing process?

MR KENNELLY: It's one way, if they want to de-list or reduce the volumes. If a product is struggling and they want to reduce volumes or de-list, yes. Significant reduction of volumes requires them to notify. It is not an onerous documentary process but it must be in writing. Normally, it's done by email, briefly recent emails but we'll see them when we look at the documents itself.

MR RIDYARD: Lots of products must go up and down. Think about sales of beef burgers when the sun shines and barbecues are happening. I mean volumes must be moving all the time. It seems remarkable you would have to trigger this process for every change in volume.

MR KENNELLY: The code arose from concerns that were raised as --

MR RIDYARD: Yes, I know why the code -- I am just curious about how it works in practice, when volumes change.

MR KENNELLY: Presumably it's when volumes change because of factors that are predicted or not within the control or not because of any fault on the part of the supplier. The reduction in volumes or de-listing doesn't require the process. Perhaps it's agreed it may not be -- it may not require the use of the GSCOP but it's regularly used when volumes are required to be changed or products de-listed.

The reason why I mentioned de-listing in particular and not volumes is because we do see in the documents, references to GSCOP, when ranges are being de-listed and short reasons given, an opportunity given to challenge the decision before it's taken finally.

But as far as I am aware and I will be corrected if I am wrong, this is used for significant rebalancing and is required to be used by the large retailers.

The key point here, of course, is that it's exactly why one would expect to see written evidence of a threat to reduce volumes or de-list, if that threat existed.

Now we go to the findings on this issue in the Final Report. That's page 194 in the core bundle again, tab 3. I am simply going to give you the references because the core findings on the evidence are summarised between paragraphs 9.52 and 9.70. 9.70 goes up to page 201. This is the analysis of the evidence from grocery retailers on competition between the parties.

I am not going to track every document by reference to every footnote and finding between 9.54 and 9.70. Subject to the tribunal, I propose to go straight to the documents that are cited here and I will do it by retailer.

But I will be taking the tribunal to each and every document that is relied upon and other documents disclosed to us, because if I am to say to the tribunal, as I do, that looking at the evidence as a whole, it does not support the SLC finding on a rationality standard, I do need to take you to the underlying documents and not cherry pick. And in the time available to me, it will be possible to do that and so that's the course that I propose to follow but I will not be going back to the Final Report and showing where each and everything is done. If I miss something, of course Mr Palmer will point it out to you but I have tried to be comprehensive.

With that, I would ask you to go first to the CMA disclosure bundle, volume 2, tab 70. I am conscious that Mr Palmer wants me to use the other bundle. The reason why I am not using it is because, of course, I marked up my bundles before they were reduced.

THE CHAIR: I know, I will be working from the CMA bundle because it's clear he wants to refer to this and I want you to refer to the same volume.

MR KENNELLY: I was going to say --

THE CHAIR: Yes, Ms Berridge will give me the references as you go along.

MR KENNELLY: For precisely that reason, to make sure --

THE CHAIR: Yes, that's fine.

MR KENNELLY: So this is minutes of a discussion with the retailer in question. As I said, I am going to deal with each retailer in turn. The retailer was concerned to ensure that it had a choice of private label suppliers. That's obvious from the material I am going to show you. The key point for this retailer, just to step back, is how its evidence developed in the course of the investigation. The CMA relies very heavily -- it, in fact, is cherry-picking on evidence from this retailer at the beginning of the investigation and less so at the back end, but the tribunal will look at it as a whole.

If you look at paragraph 11 on page 474, you see:

"If, in the course of the negotiations, the retailer doesn't achieve what it wants or is finding terms imposed by Jus-Rol are unreasonable, then it will consider giving more importance to its private label products or potentially raise the retail price of the branded products."

But you can see this, the rest of that paragraph 11.

It's said to be a lever. Then if you go down to paragraph 15 -- sorry, before I go to 15, 14. Recalling, of course, the CMA relies primarily on rebalancing on the shelf, the retailer says:

"If the negotiations weren't fruitful, [it] would look to distribution points in terms of number of stores rather than mix around how many shelves it allocates to branded versus private label products."

But it's done it both ways.

Then in paragraph 15, we see the concerns about the transaction and I draw the tribunal's attention to the speculative nature of these concerns. **(Pause)**

So one sees at the end of paragraph 15 the concern that's been raised but, of course, it needs to be substantiated and that's what the CMA sought to do. It begins with the phase 1 questionnaire and that's from April 2022 and we have that behind tab 76 in the same bundle.

THE CHAIR: You have to give me the reference again. I was just noting the last point.

MR KENNELLY: It's tab 76. It begins at page 537. Go, please, to 548. **(Pause)** 548, question 15:

"Have you de-listed any Jus-Rol products in the last 3 years? If yes, please explain which were de-listed and why and whether they were replaced by other branded or private label."

You see the reason for why they were de-listed: poor performance. We see the reasons there. Product reformulation. But not, I emphasise, because of unsatisfactory commercial terms being offered by Cérélia or Jus-Rol.

Where they de-list, it's not saying here: we de-listed because we exercised our negotiating threat and it didn't work out and, therefore, we followed through by de-listing Jus-Rol products.

Then question 16, "Price determination":

"With regards to the process of wholesale price determination, please explain at (c) whether the wholesale prices of private label products are a factor in determining the wholesale prices of branded products."

The kind of thing you'd see if they were competing even indirectly because it only asks are they a factor in determining wholesale prices and the response to (c) is: "No."

Question 17:

"With regards to the process of retail price determination [so now at the retail level] within the gift of the retailer, explain how they set prices."

And then (c):

"Whether the retail prices of private label products are a factor in determining the retail prices of branded products and vice versa."

We turn over the page to (c):

"No. Own label and branded retail prices are not linked in our price setting consideration."

The concern then is expressed about the acquisition at paragraph 18 and so the retailer does raise a concern and the tribunal can read it to themselves but, again, I would say it cries out for substantiation which is what the CMA sought to do and I will come to how they did that in the next document.

The CMA followed up in April 2022 and we see that behind tab 80 in the same bundle, tab 80, page 589. If you go over the page to 590, you see the CMA saying:

"I recall in March you said that you might lose leverage", and you see the concern that was raised, and the CMA wants them to expand on that statement and say how does the leverage work in practice, what is the basis for the lever. The tribunal can see how it's described below (a).

The key point here is having -- the real concern was having two suppliers for private label, but the concern they were expressing is that if there was a lack of supply for private label that would be a problem for the retailer. The reference to adjusting and benchmarking again we'll come to.

Then (c), whether there had been any occasions when this leverage took place. The CMA is asking the very questions we asked when looking at the Final Report.

"Are there any occasions when this leverage took place and what were your actions in response? Please provide as many examples as you see fit."

The CMA knows that it needs substantiation for these claimed concerns.

Then the response is that the leverage is exercised regularly but no action was needed because it always played its role. So it's entirely implicit. The CMA has asked for examples, any substantiation. It has nothing.

Then we come to the CMA's next question, that's a phase 2 questionnaire, and this is at tab 86, page 677.

MR RIDYARD: Sorry but is that right, that it has nothing? Doesn't this response say: we do use leverage or we could use leverage, but because we can use leverage we don't have to? It's a bit like a nuclear deterrent, isn't it? You don't need to go -- you know, you don't need to carry out the threat if it's credible.

MR KENNELLY: There are two answers to that, if I may. The first is the nuclear threat is intuitive because we know there are nuclear weapons and they are very large and very powerful. Here, the CMA goes into this exercise hopefully with real concerns about whether this kind of threat is credible at all because they know already, or they will learn, how costly and difficult it is for the retailers to switch between private label and own brand -- sorry, between private label and Jus-Rol, from the perspective of their customers, the most important people from their perspective.

So already this implicit rebalancing threat is very counter-intuitive before one asks the retailers: well, how does it happen? The retailers say, at least at the beginning, it's implicit and it never needs to be articulated because it always works. That again is highly unlikely in a market where there is competition, where the parties are negotiating, and that is why the CMA, far from saying, "Okay, fine, at this stage that's good enough for me", the CMA goes on to ask questions.

Where the CMA went astray was it continued to ask the questions and, with some exceptions, asked questions that were obviously necessary, but then instead of saying: well, we just don't have the material, you just have not given us any substantiation for this, it's just completely unlikely and unreal, they say: well, okay, fine, we'll go with this and we'll hang our -- our whole SLC will be based on these claims which are unsubstantiated.

Just to show the lack of substantiation, we go to page, as I say, 677, which is the phase 2 questionnaire, and page 685. 685 -- I am sorry, 684, question seven:

"Please indicate whether your shelf space allocated to private label has changed in

the last 5 years. The magnitude of change is not available."

But then:

"Why has the allocation to private label changed?"

The explanation given there:

"Rationalisation, certain things don't perform well, others have declined because of consumer preference."

It's not said here: we've allocated shelf space to private label or the allocation has changed because we wanted to apply pressure on Cérélia or the other or Jus-Rol to obtain better terms. This is where we would see evidence of the application of that pressure, if it existed.

Similarly, at question eight:

"Please indicate whether your shelf space allocated to branded dough-to-bake products has changed. Why has it changed?"

Has it changed because you are following through on your threat to switch volumes to get better terms?

"No, as consumer buying habits changed, space was allocated accordingly."

Why the consumer shift, we see at question nine. What about the promotional opportunities granted to private label? And of course promotional opportunities is a thing that makes a difference between whether customers buy private label or not and it makes the point that private label/own label is not promoted.

Sticking to this questionnaire response, we now go to page 688, question 14:

"Negotiations with suppliers. Please provide examples of negotiations you have undertaken for dough-to-bake products and any supporting internal documents where available."

This is exactly where you would see the GSCOP proposals to de-list or reduce volumes. Those would be the kind of documents that would be available, if they

existed.

This of course is a discussion about negotiating with private label -- there's a discussion here of private label supplier negotiations. It describes how the negotiations take place with the private label suppliers, and you will see absolutely no mention of a threat to switch to Jus-Rol, expressly or implicitly.

At 15:

"What options are available to you if you are not happy with aspects of your current private label product?"

So if you are not happy with Jus-Rol, do you say to them: you better get better or we'll switch volumes to -- sorry, if you are not happy with your current private label product, so you'd say to Cérélia: we are not happy with your price or quality, we will switch volumes to Jus-Rol. Is that what we see? Is that an option available to you? We see the scenario. They discuss the approach they take.

One option is given as a last resort. You see that in the box. Finally, a supplier review process would be launched. No mention of a threat, express or implicit, to switch volumes to Jus-Rol.

Question 16:

"What options are available to you if you are not happy with aspects of your branded product supplier's offering?"

Here, there's no mention of a shift threatened, express or implicit, to private label.

17:

"What impact do you consider the merger will have on your negotiations with your private label and branded product suppliers?"

So it's asking not just about negotiations with private label suppliers but also branded. So again you would expect to see here: when we are negotiating with Jus-Rol, we'll say give us a better price or we'll switch volumes away from you to private label. If, if,

that came up in negotiations, even implicitly, you'll see nothing to that point here. It's all about negotiations with private label product suppliers, which was the retailers' concern from the beginning. It had nothing to do with losing a constraint between Cérélia and Jus-Rol.

On page 695, paragraph 26:

"How do you decide how much private label and branded products to sell and how do you set their retail prices?"

Again the CMA undoubtedly asks for the documents to support the answer, if there are any, and we see the answer over the page, the decision on how much space is offered to private label and branded is based on a number of factors and it sets out what they are.

THE CHAIR: Sorry, what page are you on now?

MR KENNELLY: 696, electronic bundle 280. It is the box at the top that is giving the answer to the question: how much private label and branded do you sell and how do you set their prices. In deciding how much space to offer to private label and/or branded on the shelf, what are the factors? And we see them. They try to offer both so that customers should have choice.

Pausing there, they don't say how much space we offer to them is determined, even in part, by the exercise of our rebalancing threat which we use to get better terms and conditions from Cérélia and Jus-Rol.

"Retail prices are set taking into account multiple factors."

Again no suggestion that they are priced by reference to Jus-Rol or vice versa.

Then paragraph 29 on page 697:

"Please provide the total number of" -- I am so sorry, I have just -- I am nearly at the end of this document. I apologise I have gone over.

THE CHAIR: That's all right. Let's finish this document anyway.

MR KENNELLY: So paragraph 29:

"Factors driving decisions to stock. Please provide the total number of stores and the percentage of your stores that stock private label and Jus-Rol."

Again what are the factors driving decisions to stock particular products, and we see the factors there: space availability, ability, preferences, profit. No reference to the result of the alleged negotiating lever. There's no reference to the fact this allocation is driven in part by the outcome of this negotiation that we have to get better terms and conditions from Cérélia and Jus-Rol. No one says it's the reward for better commercial terms between channels.

Then page 698. Here, we have questions 31 and 32. You'll see this in part of our ground 1B about the inappropriately leading nature of these questions because the questions are leading and in an inappropriate way.

"If the wholesale price of private label products were to increase beyond the level you thought reasonable, would you consider buying more of the equivalent branded products instead? Yes.

"Is this option an important constraint in your supplier negotiations with them? Please explain and provide any documents."

The answer is in the box.

In 32, question 32, the same question is asked the other way round and the answer is:

"Look at the answer to question 31 above."

Two points to make about this. First of all, on one view this answer is inconsistent with the evidence that the retailer has given in the previous answers. But, secondly, there's no substantiation for it at all and no documents provided to support the answer. It cries out for evidential support, and we will see what came when that was sought subsequently.

Then paragraph 33 and these are relied upon by the CMA also:

"What is your concern about the merger?"

We see the concern expressed in paragraph 33 and again it's just about private label supply.

We will come to the credibility of a concern about private label supply when we look at what actually happened in the market when Cérélia lost supply in the course of the investigation to a major rival with spare capacity.

Then, unsurprisingly, faced with these single sentence responses and no substantiation or documents, the CMA goes back and we see that -- sorry, I shall stop here because I am well over my time. That's an appropriate moment for me and --

THE CHAIR: Yes, that's fine.

MR KENNELLY: -- I will continue this ... we are moving on to a new document after the break.

THE CHAIR: Okay. We'll rise. 2 o'clock.

(1.10 pm)

(The luncheon adjournment)

(2.00 pm)

MR KENNELLY: Thank you. So I was sticking with the first of the four retailers and moving on to a document from August 2022, behind tab 100 in the CMA disclosure bundle, volume 2. So tab 100.

THE CHAIR: Yes.

MR KENNELLY: The CMA's bundle, the confidential documents bundle, again tab 100, page 838. This is the difficulty, the font is tiny and so you will forgive me if I have to hold it up to my face. You need a magnifying glass for this one.

THE CHAIR: This one is pretty small.

MR KENNELLY: I am going to take it in three stages, this page, 838. I'll begin, if

I may, at the bottom email which tells you the question that's being asked. So the part that's highlighted in purple repeats what the retailer said to the CMA in the March call which you have already seen.

THE CHAIR: Yes.

MR KENNELLY: And then the CMA says:

"It's very important for it that it follows up and it asks specifically for those claims to be substantiated with documentary evidence, to show the leverage is being used."

You see that in bold. The CMA now quite properly appreciates it is getting these very, very high level claims from the retailers but it needs substantiation in order to grant an SLC.

If you go up the page, you see the response and if you go first to numbered paragraph 1, that asks for instances to make good this alleged leveraging between the channels over the last 5 years and any documents.

You see the response in italics immediately below it. There's one reference in pale blue that simply refers to pricing pressure -- that is not highlighted -- pricing pressures and profitability. There is a reference to a switch and a reference to negotiation, better commercials. There is a reference to the reverse of that happening but no specific reference to negotiating better commercial terms but it's largely, it says, a verbal process.

So, again, no documentary substantiation and, critically, no quantification, no reference to how material these discussions were in monetary terms.

Then this, importantly, at the top of that email and the retailer is referring back to the concern that it had made on 11 March which, of course, is the concerns which prompted the request from the CMA and the retailer says:

"The concerns raised on the call, raised by it, were forward looking and speculative."

They say:

"There's little by way of documentation that we can substantiate our forward looking and speculative concerns."

They go on to say it's:

"It's unlikely that anything we are describing will be recorded by email."

By definition, since we know that significant switching by volume or de-listing has to be recorded in writing under GSCOP, it begs the question how significant the very small number of switching decisions that are referenced here, undocumented, how material were they, if they weren't documented at all?

But even the retailer says the concerns they are raising are speculative.

These are sophisticated retailers. They are not using words lightly. These interactions between the CMA and the retailers are coming from the retailers in-house legal teams, they know precisely what they are doing and the meaning of what they are saying.

The interactions that are referenced that I took you to were very recent. They are a year or two earlier. Still, no documents, no quantification, nothing to substantiate them. That's why in this context we say this is not probative evidence, this is not sufficient upon which to base an SLC finding.

With that in mind, no doubt the CMA continues to ask the question and we move on now to September 2022 and we come to tab 105, page 875. This is notes of a hearing with that same retailer. We go to page 881. We see the question at line 5. So the CMA is asking:

"Does the dynamic come into mind, as you say you are doing [a thing] which gives rise to the constraint against the other and we are asking about competition."

We see the response from the retailer. They talk about manufacturing the same product:

"There would still be a mixed impact of decisions we can take."

So they say they have leverage over the mix but they say it might not be a volume

impact, that's at line 14. So they are saying themselves, to that extent the impact is limited.

Over the page, at 882 to 884, so we start at 882 and we see lines 2 to 3 and the retailer says:

"We shared previously a cross shop between brand and own label. Own label does not really compete on promotions, it's an everyday low price offer. The brand can compete through promotions in terms of moving volume from own label to brand."

That's the retail level, we say.

So that's the only element where there is some competition and the CMA presses:

"There's competition in store for a consumer [that's common ground] and there's competition for your business upstream. When you are talking about the competition, you are talking about the upstream competition, for you to buy more of Cérélia versus buying more of Jus-Rol. How does that competition for your business play out?"

And the question is repeated by the CMA from lines 19 to 25:

"I really want to make sure I am clear about how Jus-Rol and Cérélia are competing to supply you. You talked about how you wanted those firms, is it about pricing to you."

The answer is at 883. The answer is yes, but then it is asked the critical question:

"How does that materialise? When you are having conversations with them, do you say: it's too expensive, I am going to switch ..."

And the tribunal can read to themselves the answer on page 883.

THE CHAIR: Yes, we've got to 883. So where do you finish on 884?

MR KENNELLY: Sorry, 884, "The dynamic is playing out on brands", they say. If you go down to question -- line 10 from the CMA, again they are pressing. Because what you've seen before does not tell you anything about negotiating leverage on the part of the retailers to switch between Cérélia and Jus-Rol. So the CMA is pressing and

saying: is this what you are saying? And then the question is from 10 to 13. They are saying:

"You have not said that to Cérélia."

It says -- this is the actual alleged constraint:

"Have you actually put it to Cérélia?"

And the answer is:

"Not to my knowledge, no."

They've never actually articulated the threat.

Now the CMA says: well it's all very implicit but it's extremely odd and odd to the point of irrationality, if this is all they have, this set of evidence, that this important threat should exist and never be articulated, even in tough negotiations between the retailers and their suppliers.

Then we go to page 88 -- sorry, before I leave, you note again, the one way nature of the constraint, even on the CMA's case, lines 16 to 20, because there might be a constraint one way but less so the other way around because it's harder to encourage consumers to switch to buy the dearer Jus-Rol product if they want the private label.

Then page 887, lines 21, again the CMA is asking for practical instances of that trading off which is the heart of their SLC claim:

"If Jus-Rol increase their prices or you don't like the quality of their product, do you say ..."

And then they articulate how the threat would be expected to be articulated, 887 and over the page.

There is a reference to one email, the example in the email was short crust pastry which I think was from two years ago, from memory, 2021:

"We took a decision in relation to shortcrust pastry."

I'll come back to that email. But then down to line 22 -- sorry, before we get to line 22, the CMA asks:

"Why are there not more examples of your dealings? The parties have put to us they don't see this dynamic. They do not have a record of where retailers are trading them off against each other in this way. Are you able to articulate why that is or is it more of an implicit threat and you're looking at the performance data? If one is underperforming the other, then you will switch the other way. You don't need to verbalise this. Perhaps you can provide some colour."

Pausing there, simply looking at the performance data and switching, based on consumer preferences which is rather like what Mr Ridyard put to me earlier, isn't the constraint that is alleged or found in the Final Report. It's not a purely consumer driven reaction at the heart of the SLC finding. If the tribunal will recall, it's a specific finding that the retailers will implicitly threaten to switch volumes between Jus-Rol and, Cérélia, and vice versa, to obtain better terms and services from them. But then this answer from lines 17 to 22 on page 888:

"I think unjustified inflation means too high a price.

Pausing at the end of line 22, again it appears, even on its own terms, to be speculative and it's completely unsubstantiated. This is no more than a vague and speculative concern. It's not rooted in any actual experience or documentary competitive interaction, even over the last 5 years the CMA is asking.

THE CHAIR: Speculative can have more than one connotation. If speculative means "I haven't a clue, I am just guessing out of the air", I can see that's just pure speculation. Another way of looking at it is to say: look, I don't really know for sure which way it's going to go but my opinion, knowing the market and my experience, is that this may arise. That's not necessarily speculative in the pejorative sense.

MR KENNELLY: And I don't mean -- of course, sir, I will accept that and I don't mean

in a pejorative sense, the retailers have an underlying concern. Something is bothering them for sure. It's largely about worrying about a competing private label supplier, as we've seen. But that is not enough. The unsubstantiated and vague, and that word I use advisedly, concerns of the retailers are not probative evidence for the purpose of a rationality challenge. These retailers are expressing concerns to the CMA. The CMA cannot, we say, rationally base its SLC finding on this without substantiation which is what they are asking for and it's telling the more they ask, the less they get. It's becoming more and more diffuse and this, when it comes from sophisticated complex businesses with in-house legal departments and aggressive sales negotiators, it demonstrates that there is no safe basis for the constraint which the CMA ultimately found. Because the constraint, as I keep saying, is a very specific one. It's that these retailers can threaten Jus-Rol and Cérélia to switch from one to the other in order to obtain better terms and conditions. Not simply because they are reflecting consumers actual preferences, it's in order to get better deals from Jus-Rol and Cérélia. That's what they are asking for.

They are saying: you are suggesting this exists, where is it? And the answers they are getting demonstrate it's not a real constraint, there's nothing to back it up.

What's telling is that we know from the material you've already seen that there are regular negotiations between the retailers and their suppliers, where questions of price and listing and volume are negotiated. It's just not credible that this important constraint is never ever mentioned. Other levers are used. There's no question that levers are used within channels: Cérélia, if you don't do a better job, I'll switch to Bells or Henglein. Similarly, Jus-Rol, we expect more from a brand within the Channel, sure, but the cross channel switching threat that's alleged, we just don't see it.

Then at 891, the question is asked at lines eight to ten:

"To what extent are you confident that the importance of retailer as a route to market

will prevent any increase in prices or deterioration?"

THE CHAIR: What page are we now?

MR KENNELLY: 891.

THE CHAIR: Yes.

MR KENNELLY: "Will still be a significant part of the volume."

There is a reference to the leverage that the retailer itself will have.

But then this. And this is very important because it was suggested -- well certainly one can understand the concern underlying, perhaps, Mr Ridyard's questions to me earlier. Are we being too clever, are we focusing on the CMA's error, while behind us there is some consumer harm that will go unchecked if this merger is not prohibited?

Here we have the retailers' insight into whether there's actually likely to be deterioration in price and quality and here, the retailer says from 16 to 20:

"The current dynamics in this category is actually a growing category. While these dynamics are there, it is in no one's interest to halt the growth of the category through either innovation or through investment and promotions range, et cetera."

I would add excessive prices. So while the category is growing which it is, the retailer does not expect a deterioration in quality or price, it expects innovation and investment to increase but the concern arises in the context in the highlighted section which follows the end of -- of lines 19 and 20.

So the concern that there might be some consumer harm at the end of all this is quite unreal and I will come to that too, when I come to the constraint exercised by other private label suppliers.

That is the material from that retailer. In my submission, this is not consistent and coherent evidence in favour of the existence of this implicit threat to switch volumes between Cérélia and Jus-Rol to get better terms and conditions. We've seen the material from this sophisticated retailer and it's not there. I will turn now to the next

retailer and for that, you need to go to the first CMA disclosure bundle behind tab 10. Tab 10, forgive me.

The point, the overall point with this retailer is that it never raised this alleged rebalancing threat until it was prompted by the CMA and this retailer provided nothing to substantiate that threat. I will begin in January 2022 on tab 10 of this bundle. Pages 90 to 91.

The real concern again from this retailer, is the lack of an alternative to a private label supply. Their concern is itself based on an error. If you look at the bottom of page 90, there is a reference there to who they think is the only other supplier for own brand chilled pastry. That's a reference to Henglein and we know and, more importantly, the CMA knew, that Bells was a powerful competitor in this market and won a major contract from one of the four big retailers at the time of the Final Report.

If you look at the views and impact of the transaction on competition on page 91, you can read that to yourselves, you will see no mention of any competitive constraints between Cérélia and Jus-Rol, no mention of any ability to flex volumes between them as a negotiating lever. Nothing. Nothing like that.

Then the CMA followed up in March 2022. For that, you need to go to tab 71. I am just checking to see if it's in your CMA bundle. Yes, so it's in the confidential bundle as well. The minutes of a discussion with that same retailer. You see that from page 477. I would ask you to go, please, to page 480. Paragraph 24. There is a reference here to whether Jus-Rol and Cérélia are competitors but when you read that paragraph 24, you see what they are referring to is retail competition.

In paragraph 25 there's a reference to them not pitching against each other and that is said to create a challenge for the retailer. At 26 there is a description of how the competitive tension plays out.

But this tension appears to be entirely consumer led, the consumer's perspective, as

it's being described, and this goes to the heart of many of the retailers' responses. When they discuss competition, they are looking at competition between private label and Jus-Rol, vis-a-vis consumers on the shelves. There's no suggestion of this retailer actually trading Cérélia off against Jus-Rol to get better terms and conditions, in the negotiations with them.

Then the CMA follows up with a phase 1 questionnaire. That's on tab 74, also in the confidential bundle. Page 509 it begins. Please go to page 519. Question 15 and, again, you'll see this questionnaire popping up for each of these retailers:

"Have you de-listed any Jus-Rol products in the past three years? If, yes, please explain why they were de-listed and whether they were replaced by branded or private label products."

We see the answer:

"There has been some de-listing", they say.

Then response to (b), in answer to the question were they replaced by other branded products or private label:

"They were not replaced or replicated. This was not a rebalancing."

Question 16:

"What about the wholesale price determination for these products? What are the factors that inform wholesale price negotiation for private label products and for branded products?"

Again, if there was competition in the sense the CMA describes between them, you would see something but the answer from the retailer is nothing. They choose not to respond to this at all.

When we come to see the concerns expressed about the transaction, the fact they've chosen not to say anything about price competition is material to the weight you give the comments that you see later.

It will be a key indicator of a competitive dynamic between Cérélia and Jus-Rol, if one exists. 521, question 18:

"Whether you have any views about the impact of competition on this acquisition and any concerns about competition arising from the transaction."

Over the page, again nothing.

This must --

MR RIDYARD: So you are saying -- this retailer did express concern, didn't it, about the effect of the merger on prices for private label products?

MR KENNELLY: Yes, the concerns about supply on the private label side, yes.

MR RIDYARD: Maybe this is an unfair question but why do you think it had that view if it didn't think there was any interaction between -- any impact on their bargaining power?

MR KENNELLY: Well, that's a very good question but one the CMA needed to ask and they did. I will show you. They go on to press them on that because on the one hand, they say they are concerned about competition to supply them with private label products. It's not clear to the CMA, it seems to me, in this discussion they are having, what the role is of Jus-Rol in that scenario. They may have concerns about who is going to compete with Cérélia to supply the private label but that has nothing to do with Jus-Rol and what the CMA is struggling to establish here is: what is your concern about this merger if Jus-Rol has nothing to do with the problem you are telling us about? So that's where this goes.

MR RIDYARD: Yes.

MR KENNELLY: The answer is it doesn't have anything to do with the problem that they raise and that's not a problem either because of the tension from Henglein and Bells. But the primary answer is it has nothing to do with the particular merger in this case.

The CMA follows up at tab 79 this time, on page -- it begins on page 568 but I would ask you to go to -- yes, 568. Start at 569 and the answers are on 568. So we'll go first to 569. The email from the CMA to the retailer, referencing a comment made on a call, where the retailer referred to the fact that Jus-Rol and Cérélia were no longer pitched against each other in both the categories of own business and the CMA wants to know what that means.

Those are the questions (a) to (d) that the CMA asks them about: how does it work in practice? What is the extent of this alleged leverage? What is its source? And, critically: any examples, any examples to show us that this is a real thing.

We see the answers on page 568. When asked to give an example exercising this leverage, they said:

"By reference to business plans, we increased our range of Jus-Rol to improve performance and ...(Reading to the words)... expense of private label."

So one was expanded at the expense of the other.

So the CMA would say: well, this shows at least one is being expanded at the expense of the other. But what it's not evidence of is any exercise of leverage. This could just as easily and, in fact, it looks like it is, be a response to consumer preferences. What we don't see here is an exercise of leverage vis-a-vis Cérélia or Jus-Rol or Cérélia and Jus-Rol being pressed to improve their prices or conditions because of the threat of a rebalancing in favour of one or the other.

The simple fact that supermarkets can move product around their shelves isn't enough. There has to be a demonstration that there is some kind of leverage being exercised vis-a-vis Jus-Rol and Cérélia.

That is the constraint. If that leverage is not being exercised, even implicitly, then there's no constraint and its removal has no impact on competition.

The interactions described here really reflect retail competition, where consumers

might prefer one product over the other to a varying degree and that then drives retailers to buy one more than the other. That's not the same as the retailers going to Cérélia and Jus-Rol and saying: if you don't improve your price or conditions, we will switch to your rival and exercising that leverage as a way of obtaining better terms and conditions from their suppliers.

There's not even a suggestion that this change they refer to was used even implicitly to secure better terms from either Jus-Rol or Cérélia. That's the key. They are not saying: this view we took to switch from one to the other was used to get better terms from Jus-Rol or Cérélia. There's no suggestion they even had that in mind. That's what you would expect to see if this constraint existed.

Then we come to the phase 2 questionnaire and that's at tab 88, also in the CMA's bundle. Page 729, question seven:

"Please indicate whether your shelf space allocated to the private label has changed in the last five years."

Page 730, we see the answer:

"So we de-listed tailor range as a consequence of negotiations."

Tailor range is the end of range product which is often dispensed with because it's less attractive to consumers and that was:

"We de-listed as a consequence of negotiations with the branded supplier. We didn't need both private label and branded offering for that part of the range."

So, again, no suggestion here of negotiating leverage. This could just as easily be a reflection and appears to be of consumer preferences.

Then question eight on page 730:

"Please indicate whether your shelf space allocated to branded dough-to-bake has changed."

"There has been some change."

And how has that arisen?

"Commercial negotiations could see distribution increasing in return for a different investment via promotional support or range review outcomes."

Not: we have been allocating more to branded dough-to-bake as an outcome of negotiating pressure placed because of a threat to switch to more private label. No suggestion and at this stage, the retailer knows the potential theory of harm the CMA is raising. There's no suggestion here of any implicit replacement threat.

Then question 13 about retail prices:

"Please explain the extent to which dough-to-bake product suppliers are involved in aspects of the product offering. So to what extent are the suppliers involved in product offering, for example, setting retail prices."

There's a reference over the page, 733, to competitive tension. If you look at page 7 -- sorry, this is question 13 and there's a reference to competitive tension in relation to pricing. The tribunal can read that to yourselves. But this, as you can see from the box as a whole, is about retail pricing. This is how this retailer sets its retail prices and is referring to competitive tension in the supermarket between brands and private label that do compete, there's no doubt about that, facing consumers. That's the trade-off. It's not a trade-off between Jus-Rol and Cérélia in negotiations with retailers.

Question 15 on page 734:

"What options are available to you if you are not happy with aspects of your current private label product supplier?"

So here, again, we'd expect them to say: well we could switch volumes to brand. You see what they say there. As I will show you later, this retailer is actually under a misapprehension as to available suppliers of private label. A misapprehension which the CMA ought to have remedied and did not and it's an important point because

this retailer isn't aware of the actual spare capacity in the market, as this answer demonstrates. We know that because of the fact that one of them obtained a very significant contract with one of the other retailers during this process.

But critically, for my purposes, to the direct question: if you are not happy with your private label supplier, what are your options? There's no reference here to any implicit replacement threat that could be used to improve the options offered by the private label supplier.

Question 16:

"What options are available to you if you are not happy with your branded supplier?"

Again, well, if the CMA was right, they would say: well we would say to them: you better improve or we will switch volumes away from you to private label. That's not the answer they give, nothing like it.

Then page 740, question 26:

"How do you decide how much private label and branded products to sell and how do you set their retail prices?"

Again, the box, when you read it, is all about retail pricing. There's nothing here to support an implicit replacement threat theory.

743, we come to the leading questions 31 and 32 and, again, if I may say so, rather surprisingly, a view of what they've said so far on the questionnaire, when asked the leading question:

"If your wholesale price of private label products were to increase beyond the level you thought reasonable, would you consider buying more of the equivalent branded?"

The answer is "Yes." Yes for 32 and -- 32(a), forgive me.

The question:

"Is this an important constraint?"

Over the page, 744. Now the CMA looking at this, again as a rational regulator, would

note first of all, just how vague this statement is and, again, the complete lack of supporting documents. There's also a clear reference in this text to retail competition and a preference to buy within the channel. That's the starting point. You buy within the channel rather than cross-channel.

But, ultimately, they want their customers to have the most competitive product offer, range choice and price and they reiterate this point about range being critical which goes to the constraints that operate on a retailer in switching between Jus-Rol and Cérélia.

Ultimately though, they are tracking customers' preference. Because, in my submission, of the vague nature of this response, the CMA goes back to them in August 2022 and we see that at tab 93. Tab 93, page 789. Actually, please go to 788 first. At the bottom of 788, we see an email from the retailer to the CMA. They say: "We don't have any documentation. We have not had a tender in the last five years, so we can only provide written evidence for the following."

And it lists where it thinks it could provide written evidence and the tribunal can read that, which does seem to refer to de-listing of own label, preferring one over the other. And the CMA, above that, says: oh actually, yes, we'd like to see that written evidence on those points, where there was such de-listing, where there was this interaction between brand and private label, by reference to cost, supply and customer need.

Then 787, there are also some direct questions for the retailer below and the CMA asks:

"Do you have a preference for stocking private label or branded and what factors influence your preference? How often do you run these tenders. Are they run on a fixed or ad hoc basis?"

The answer to all of these are on page 786.

First of all, two emails are attached to this document and I'll go to those emails now.

The first email is in tab 94 of this bundle. It's also in the CMA bundle. Page 798. There is a confirmation of our decision to de-list. You can see why. Pursuant to the -- this is a GSCOP email, following a performance led review -- sorry. **(Pause)**

Please read the email in its entirety. **(Pause)**

So there's no mention, even indirectly, of any implicit replacement threats. There's no comparison with any other supplier, there's nothing even indirectly along the lines of: because you failed -- we are getting a better offer or potentially better offer from Jus-Rol or Cérélia and if you don't match it or beat it, we will switch to them. The kind of replacement threat that one would see if they were genuinely being used by way of negotiating lever in negotiations between retailers and suppliers.

I appreciate the CMA's case is that it's implicit, so we look to see where the clues are here that would disclose an implicit replacement threat and there just isn't anything. There's nothing here to suggest that any comparison is being made between Jus-Rol and Cérélia.

The second email, the second email is on tab 95, also in the CMA bundle, page 799. Again, when you read this, you will see no mention of any kind of replacement threat. Nothing to suggest an implicit replacement threat. If you go over the page -- just to help you before you read it, on page 800 there is a reference to branded products but specific SKUs are referenced at the top of page 800. Those aren't even available in private label. There's nothing here to suggest the exercise of implicit replacement threat or anything like it.

I would ask the tribunal to read that -- it's confidential in its entirety. **(Pause)**

THE CHAIR: But a threat can be, as you say, can be implicit and it can still be credible without you saying it exists, can't it?

MR KENNELLY: Yes, but forensically, the CMA, in order to establish the thing exists at all, in order to make sure that it's not an unsubstantiated assertion by retailers that

have some other concerns about the merger that aren't necessarily linked to CMA's own theory of harm, it's incumbent upon them to check if it's realistic. Of course, if it's implicit by definition, it will not be express but there has to be something to substantiate. There has to be some probative evidence to demonstrate to the CMA and the tribunal that behind this, there's an implicit threat that if these suppliers do not give better prices or services, the retailer will switch volume or de-list in favour of Cérélia or Jus-Rol. But that's what we are looking for and that's distinct from: we are going to stock less of you because our consumers prefer the other guy. We are looking for a negotiating lever, where we say: we will switch between you to get better terms and conditions.

THE CHAIR: But let's say you go down the alley of orange sellers and there are four orange sellers in a row. When you go to the first orange seller and start arguing about price, you don't need to tell them, actually, there is another orange seller you could go to, there's an alternative. But if all four orange sellers are owned by the same guy, it's a different scenario.

MR KENNELLY: Absolutely. It's a bit like a nuclear deterrent threat. In both of those scenarios, it's blindingly obvious that there's a rival willing and able to step in and take your business if you don't offer the customer a good deal or in the nuclear threat, if you don't act, a bad thing will happen.

Here, the CMA accepts these products don't compete directly in their channels. They don't compete head to head. They don't compete in the traditional way and there's very good reason for that. First of all, because they are not identical products. They are differentiated which the CMA accepts. From the retailers' perspective, facing Cérélia and Jus-Rol, they are differentiated, even if the consumer in the shop thinks in some situations they may be similar. The second reason is the retailer is driven by consumer preferences and I come back to where I began, the risk he will lose

customers and business if he doesn't stock the particular product. A very different case if the CMA had undertaken a proper diversion analysis and worked at the impact on sales for retailers and worked out if there had been a constraint that somehow, the retailers would exercise by reference to their customers' demand. We wouldn't accept that even then there is a constraint because we can see that customers, if they don't get the product they want, will leave in significant numbers. So there's no constraint there either --

MR RIDYARD: That's just not right, is it, because there's some diversion between private label and branded products and you accept that?

MR KENNELLY: Sorry, spoke too quickly, there is some diversion but the reason why there's no constraint is because in our submission, whatever cost savings the retailers could make if they drove a better bargain, relying on this, we say, pretty theoretical switching threat, those savings would not outweigh the costs they will suffer by upsetting and losing their customers' business. But the tribunal does not need to ask that question. The CMA never asked that question. They never undertook the analysis to test that thesis and that is a different decision which is not the one before you. They skipped that and they went straight to this crude constraint which is that the retailers will say: if you don't give me better terms and conditions, I will switch away from you to Jus-Rol or Cérélia. Not just comparing prices or benchmarking but to be a real constraint, they have to be a credible threat, switching away from Jus-Rol to Cérélia and vice versa. It's just not there. It's not on the evidence at all. What you see is a concern about consumer competition and private label supplier concern but the constraint the CMA identify just isn't here.

Sorry, you have seen that second email and I hope you have had a chance now to read it. But, again, as I said, you'll see no reference there to anything like an implicit rebalancing threat or --

THE CHAIR: Is it part of your case the reason why there's no evidence of the implicit threat is that if they'd made it explicit, it would have nothing behind it?

MR KENNELLY: Yes, it must be but logic --

THE CHAIR: Because the options to the supplier may be -- I mean the retailer may be limited because of the consumer preferences.

MR KENNELLY: Absolutely.

THE CHAIR: So they could say on one level: okay, we'll go to the branded product. But it's not a credible threat because they know if they did that, they'd be cutting their own private label and they've got a following for that. If it's the other way round, you would have the same point going the other way round which is that it wouldn't be a credible threat.

MR KENNELLY: And that's apart from the fact they were trying to threaten Cérélia. If Cérélia is indifferent because its margins are very similar, whether supplying Jus-Rol or private label, again it's not a credible threat. You are quite right, sir, if this threat were to be expressed in an email, the response would be: so what, it's just not real, which is why we say it's even more surprising because the CMA's case is the diametric opposite. They say this threat is so important and so well known, not only does it need to be expressed but it always works. It always works which is why we never see an email saying: well notwithstanding the understanding that I'll switch away from you, you have ignored me and so I am now switching.

THE CHAIR: It doesn't have to always work to be a threat. Not all threats need to be carried through. I am just trying to work out how credible the threat is because if there's no credible threat, then you may go down a different route.

MR KENNELLY: It's both because the CMA is -- I maintain the position because they say it's so well known and so important that it's implicit, it is well understood and, secondly, and they say this because they were told it by one of the retailers, that: oh,

there's no documents evidencing any of this because it works. We've not had to complain about the suppliers not understanding the threat because it's always worked. So the CMA's case is it's so important it's universally understood and, effectively, always successful, so we never see any documents saying: we are very surprised you didn't get the well understood threat, so now we are going to switch away from you to Jus-Rol or Cérélia. And that's just completely unreal, when one looks at the cost benefit concerns that retailers have which you've seen and all this documentation which talks about everything under the sun, except a threat to switch from one to the other, in order to obtain better terms from Jus-Rol or Cérélia.

THE CHAIR: It can still be a threat and you don't actually implement it.

MR KENNELLY: Of course, but in asking if the threat is real -- the problem I have is I am proving a negative. In proving its existence, in proving it exists, there here has to be something the CMA can point to, to show its execution or the understanding of the execution being a possibility. It's just not there. I am sorry I am labouring this point and taking you through reams of material because I don't want it said against me at the end, well I cherry picked or skipped over bad documents. I am taking you to the whole evidence base and you'll see it isn't there.

May I continue because it's --

THE CHAIR: No, of course, it's fine, it's not a problem.

MR KENNELLY: I completely understand, I am not saying implicit threat is an impossibility. Of course, threats can be implicit, especially threats that are extremely obvious and intuitive, like the oranges threat or them nuclear weapon threat. They are implicit because they are so obvious as to require no articulation. We are a million miles away from that in this case, for the reasons I have been explaining.

MR CUTTING: Can I complicate things slightly or maybe not. In the documents you have taken us through from supermarkets A and B let's call them --

MR KENNELLY: Yes.

MR CUTTING: -- it looks through the documentary run as a whole, of those interviews or meetings or hearings, that the relevant individuals answering those questions at the supermarket, at least believed that they could make that threat. So I just wonder how that plays in? Because leave aside the question of testing and apart from anything else, they are hypothesising as well, about a future scenario that's not yet come to pass, the closing of the merger, but there's evidence there they clearly believed they had the ability to threaten.

MR KENNELLY: May I just unpack that because it's the last point you made. They clearly believe. When one looks at the oral statements that were given in those interviews and in those meetings, it's not clear, in my submission, that they really do believe it. They make certain statements upon which the CMA relies and some of them are prompted by the CMA's questions, others not. But when one looks at the statements in their context, often they are confusing this concern with either consumer competition which is undoubted and the concern about stopping the merger, because they think it will protect them from excessive prices on the private label supply side which is a misplaced concern, as I will come to. But one has to drill down into what those retailers' employees have to back up that concern they do express to the CMA and that's why, in our application, we don't say the supermarkets express no concerns, we say the CMA's irrationality was to rely uncritically on the evidence of these individuals. But I can't deny -- you have seen I am taking you to where they say it themselves but the question is that the CMA has to make a rational judgment as to whether this is real or not. And it's not rational for them simply to say: well, we were told it by this retailer; we asked for substantiation, we didn't get any, but that doesn't matter, we are going to just rely on this unevidenced assertion, in the face of the material I have shown you which is that it's extremely costly and difficult for retailers

to reduce volumes of products their customers want.

So that's the issue.

MR RIDYARD: It's costly for them to de-list products just sort of for the sake of it, as it were. But I keep coming back to the SLC hypothesis which is post-merger, the firm will have incentive because of the merger to raise the price of one or other or both of the products, so isn't that the scenario we should be thinking through all the time? The CMA's hypothesis is post-merger, Cérélia will choose to increase the price of, let's say, private label products unilaterally because they keep coming back to because of retail level competition, some of -- when it does that, it will follow through to higher rate, retail private label products and some of that will then get diverted to the branded products and post-merger, Cérélia will enjoy that in a way that it didn't enjoy it previously. That's really the SLC theory of harm and it's a retail level of concern but it does feed through to what happens at the wholesale level.

So there, if that's the scenario, then the retailers are not just willy-nilly rebalancing things. The question is given that the wholesale price of one of these products has increased because of the merger, does that change the way the retailer is likely to behave at the retail level and, if so, if that changes the way consumers behave, then is that going to result in a rebalancing of volumes between the two channels?

MR KENNELLY: I understand. There are three answers to that. The first is you have to ask what is the reason that the CMA says that the competition will be harmed post-merger. What is the basis for this concern about price increase? They say it's the removal of the constraint that Jus-Rol and Cérélia exercise on each other because retailers trade them off against each other to get better terms. I keep zeroing in on that.

MR RIDYARD: Yes.

MR KENNELLY: Because that's the hook on which they hang their case. If that's not

there, there's nothing.

MR RIDYARD: So if that happens indirectly as a result of what has happened downstream, you are saying it's not good enough. It has to be independent conduct that occurs at the wholesale level, irrespective of what happens at the retail level.

MR KENNELLY: No, I said I had three points. The second is the point about the private label suppliers. That's a very important point because even on the thesis that, sir, you outlined to me, that thesis, where there would be this overspill into Jus-Rol as a result of price increases by the merged entity, we can show you -- and we'll come to this -- the constraint is exercised by the other suppliers of private label products which the CMA has massively, irrationally, underestimated.

MR RIDYARD: Okay, we'll come to that.

MR KENNELLY: We'll come to that and that's very important.

MR RIDYARD: I understand that.

MR KENNELLY: The third point though, this is about consumer harm, is that if I am right that the private label suppliers exercise a constraint on Cérélia and on the CMA's own case, if people do switch, as sir, you've outlined to me on your thesis of consumer switching from private label to Jus-Rol, if private label is constrained by those other suppliers of private label products, that constraint will keep private label prices down and Jus-Rol prices down. That constraint will operate across both. In fact, in this case, because the merged entity will be looking after both Jus-Rol and private label, the risk of high prices is reduced, not increased overall. Because assuming I am right that the private label suppliers exercise that constraint, retailers, when negotiating with the merged entity, can say: well, there's our private label negotiation and I have you over a barrel because otherwise, Bells or Henglein will come in and take your business and by the way, I want you to do me a favour on these other lines too, including Jus-Rol. So retailers are in a stronger position, if I am right about the private label

constraints, than they are currently.

MR RIDYARD: The retailers are not saying that, are they? That's not an argument any retailer has come up with, as far as I know.

MR KENNELLY: No, retailers haven't but that's partly because at least in one case, one retailer has manifestly misunderstood the extent of constraint offered by the other private label suppliers and the CMA has irrationally failed to bring that to their attention and it's relying on their evidence, even though the CMA knows it's erroneous. One retailer said to the CMA: we don't believe this supplier has capacity and the CMA knows and knew it had capacity and didn't correct that retailer and, instead, it relies on the retailer's comment. I will come to that. It's a very important point.

Returning to the documents and the lack of evidence of implicit rebalancing threat or anything like it. We are now I September 2022 and the second volume. This is tab 107, page 900. Follow-up questions to the same retailer. Beginning on 899 and they are asked, before the merger:

"How Cérélia and Jus-Rol compete to supply dough-to-bake products to yourself. How can you use this competition to get a good deal? And please provide examples."

And if the tribunal reads the rest of 899, especially the very last sentence and over the page to the top of 900.

(Pause)

The first point to take from that red text is that we are not seeing here, a replacement threat at all. The retailer is using the costs of Jus-Rol and Cérélia as benchmarks. It's useful information to have in their separate negotiations but they say they don't disclose commercially sensitive information. It appears they don't actually bring it even to the attention of Jus-Rol or Cérélia that they are bearing in mind the costs of the other, when they negotiate with Jus-Rol and Cérélia. It goes no further than that. There's no question here of any kind of even implicit threat to say: we will switch away

from you to a different channel, in order to induce you to provide better prices and better services.

Now they do say at the very bottom of 899 there could be examples where there are limited opportunities for direct decision between own label and branded but that's very limited. That's not the main way in which they say competition works. All it is is internal benchmarking. There's no replacement threat understood by Jus-Rol or Cérélia or expressed in any way.

Page 901, they are asked about a single example. At 2014, there is a reference to a de-listing:

"Please give us context. What does it mean in terms of cost, supply and consumer need. Quantify it, please. Was there any response to improve terms?"

It's the kind of thing you'd see if there was a replacement threat actually existing. But you see the response, as we noted when we submitted to the CMA this was an anecdote, an anecdote.

The tribunal can read for themselves the rest of that section.

This is not, in my submission, coherent and consistent evidence of the existence and exercise of an implicit rebalancing threat. There's follow-up by the CMA, unsurprisingly, in September 2022 and that's at page 903. The follow-up questions there to the next page.

THE CHAIR: So on 901 and 902, you'll say although they thought they had this, you are saying in fact they didn't?

MR KENNELLY: I am sorry?

THE CHAIR: 901, 902, you look at the answer they've given to question 14.

MR KENNELLY: Yes.

THE CHAIR: And then you look at the end, where they talk about "the presence of more than one viable supplier that creates competitive tension in our negotiation

process."

MR KENNELLY: Yes.

THE CHAIR: Clearly they believe that but you are saying --

MR KENNELLY: They say that but the CMA looks back at the reasons for the de-list and it doesn't include that.

THE CHAIR: No.

MR KENNELLY: This is extremely vague, speculative and unsubstantiated. Which is why, no doubt, the CMA comes back and asks for more.

But one sees follow-up questions on page 903:

"Explain what the retailer would do if Cérélia increased the price or degraded the quality."

What would they do if that happened in the case of Jus-Rol products. One is private label, two is Jus-Rol. The tribunal can see the answers. The word "might" is used, "We might decide to de-list." Even then, there's no suggestion they would say to Cérélia: if you do that, we will switch volumes to Jus-Rol. This is a confidential document. It's inconceivable why they would not say that to the CMA, if that was genuinely a negotiating lever that they had.

The concern, the extent of the concern you can see from the word "our expectation", because again, are we really concerned about genuine risks of consumer harm? You can see under one, what the retailers' expectation actually is that Cérélia would do and that should tell the CMA that they are barking up the wrong tree. Not only is the evidence so weak as to not give a rational basis for a decision but even the retailers don't think that there will be such a harmful move.

Then 28 November, tab 113. One is still in -- you have this also in the CMA bundle, I have it in MDB3, tab 113. It begins at page 982. I would ask you to go, please, to 998. The question at line 3 comes from a staff member. Panel member asks

a question at line 5 -- I would ask the tribunal to read from line 10 -- asked a question about -- acknowledges they're not playing one explicitly off against the other but:

"Can you show us any sort of reaction from the alternative supplier? Is there a recognition from the other supplier that they are subject to this implicit rebalancing threat? And if not, why not?"

You see the answer from line 17. There's reference to innovation. The supplier who loses shelf space might try and do a little bit more. Over the page, 999, however, not really seen significantly more innovation, in fact, and haven't seen improvements.

So in answer to that direct question, that is the answer. At most, it's a reference, again, to consumer choice driving everything, but no suggestion of anything to support an implicit replacement threat.

If we go back to 996, the same tab, we saw this earlier, this again is the fact that, actually, it's the consumer that drives everything, the consumer that drives the negotiations between the retailers and Jus-Rol on the one hand and Cérélia on the other. It's not an implicit rebalancing threat that drives shelf allocation between them.

When asked about how competition between Cérélia and Jus-Rol works, this employee of the retailer didn't say: it's also very important, in addition to help keeping consumers happy, to get the best deal from Cérélia and Jus-Rol and we will threaten each -- or they understood they would be switched away from, if that deal wasn't good enough. We would change allocations from one to the other if they didn't give us a better deal.

And that's it. That's the evidence on this retailer. So we see the concerns being expressed for sure, but our application is that the CMA relied, uncritically, on those unsubstantiated statements and when they asked for substantiation, they were given this. And faced with that, a rational regulator would have stopped and said, "We can't base the SLC on this. In the face of repeated requests for substantiation, we are

getting nothing", and it was counter-intuitive to start off with.

The next retailer is at tab 73.

THE CHAIR: We will look at that after the break.

MR KENNELLY: Forgive me, yes.

THE CHAIR: Okay.

(3.15 pm)

(A short break)

(3.26 pm)

THE CHAIR: Yes.

MR KENNELLY: We are on next retailer and phase 1 questionnaire. This is, as I say, tab 73 which you have in the CMA bundle. If you go, please, to page 506, where we see the answer to the question relied on by the -- I am so sorry, it's question 18, 508. Page 508, question 18. So it's tab 73, page 508.

They are asked:

"Have you any views about the impact on competition as the acquisition? Please provide us with an explanation."

You see the explanation they give, upon which the CMA relies.

Now I make the point here that this answer is still consistent with concerns about the amount of competition in each of the channels and not about the fact that some cross-channel tension will be removed. But in any event, when given specific questions, this retailer is much more equivocal. If you go back in the same questionnaire to question 13 on page 505:

"Please explain what is involved in switching manufacturing and packaging suppliers to the supply of private label products. So what's involved in switching from private label, cost, time, motivations behind the switch, available alternative options."

And we see the answers.

We have in the second line, as relied upon, as private label as an alternative if Jus-Rol became uncompetitive. But in our submission, that language we see in that second sentence is extremely equivocal and it's limited to frozen, whereas the focus of the SLC is on chilled dough-to-bake. That's the main focus of the SLC. We see at question 15 on page 506:

"Have you de-listed any Jus-Rol in the last three years?"

Again, very familiar now with these questions and we see the response in the box and it suggests that there was a de-listing of Jus-Rol, the branded product and a replacement by a private label in part.

It's not clear that that is, in fact, accurate, in view of the other evidence that this retailer gave. If you go to the phase 2 questionnaire. It's on tab 85. This is what the CMA ought to have done. Tab 85, page 666:

"Please indicate [this is question 12] whether the product range of the branded dough-to-bake products you sell has changed in the last five years. Please distinguish between private label and branded."

And we see a magnitude of change and there is a magnitude of change there. It's an increase and there is a reference to the explanation. There's no suggestion of a decrease in the product range of the brand that we saw in question 15 on page 506. So there's a real inconsistency, an important inconsistency because the CMA relies on this evidence at page 506, within the retailer's own evidence and this goes to the, again, queries that a rational regulator would undertake. Without having made those queries and bottomed this out, it's not rational for the CMA to rely on this evidence which is contradicted by the retailer itself.

Then we look at question 15. Even if that's correct, even if there was this de-listing, it's not said it was de-listed because Jus-Rol failed to respond to even an implicit replacement threat. It does not say why there was a replacement in favour of private

label or to what extent.

Then paragraph 16, question 16, with regards to the process for wholesale price determination -- you've seen this question before, question --

THE CHAIR: Are we back on --

MR KENNELLY: Forgive me, yes, I'm back on the phase 1 questionnaire, page 507. My point there, Mr Cutting, was, actually, since I didn't give you the proper reference, I go back to 506. The point I was making at 506 was even if the answer to question 15 was accurate and as I suggested, it doesn't appear that it is, but even if it were accurate, it still doesn't support even implicit replacement theory because being asked what's the explanation for the replacement, there's nothing to suggest that it was driven by the exercise of a replacement threat, either implicit or explicit.

Then question 16 on page 506:

"Are the wholesale prices of private label a factor in determining the wholesale prices of branded products?"

The answer you see at (c) but it's by reference to the price points that consumers expect. There's no reference, again, to any replacement threat.

Paragraph 17:

"As regards the process of a retail price determination, how do you set them, and how do you set your prices for private label products? 17(c) and, again, an entry price point.

Moving on then to page 672, this is the phase 2 questionnaire. I will begin, if I may, at question 25. Question 25 on page 672. Competition between dough-to-bake products:

"Do you consider Cérélia and Jus-Rol compete with each other in the supply of dough-to-bake products?"

And you see the answer. The answer is "Yes", and the explanation is given.

To the extent the CMA relies on limited shelf space, it's not in dispute that supermarkets have limited shelf space but the fact that there is limited shelf space and retailers decide how to mix their allocation, does not make good the implicit rebalancing threat, the fact such a constraint exists. Apart from the fact that, and we made this point in our application, the CMA has not explained how merely having more shelf inches induces a customer to buy the product that is given more prominence on the shelf rather than the product they would otherwise want. Simply seeing more of one product on a shelf rather than less of the product you want, we said to the CMA, isn't going to make you stop buying the product you want and buy more of the other product. The CMA has not engaged with that point at all. It simply asserts increased shelf space is the competitive dynamic. For the reference for our application, that's paragraph 66 of the Notice of Application. But the key point here is that simply referring to limited shelf space does not prove that the retailers, when negotiating with Jus-Rol and Cérélia, has a threat, implicit or explicit, that they will switch from one to the other, in order to get better terms from one or the other. The fact of limited shelf space does not make that point good of itself, they need to show the constraint exists.

Question 26:

"How do you decide how much private label and branded products to sell and how do you set their retail prices?"

And, again, you can see in paragraph 26 what the answer is and there's no reference to an implicit or explicit replacement threat in deciding how much of private label or branded a retailer decides to sell. It's driven by customers, as we've seen numerous times. At no point do they say:

"And it's driven by whether the supplier, Jus-Rol or Cérélia, responds to the threat, implicit or explicit, that we will switch away from them if they don't give us better terms."

It's nowhere here.

In question 27, there is a reference to a question:

"Do these products compete with each other? Do you sell both private label and branded?"

And the answer you see in the box, why they say they compete with each other is because of retail competition. They are referring to consumers.

675, we have the same questions we saw before, questions 31 and 32, and the answer you see in the box, in the yellow box. The same answer is given over the page at 676, in answering question 32. There's no explanation as to why this is an important constraint, if it is. There's no reference to negotiations and, obviously, no documents at all and no examples.

A rational regulator, again, having seen what the tribunal has seen, would follow up on this and expect detail and documents to back up this assertion, otherwise it's not safe to rely upon it for the purposes of an SLC. It's an unsubstantiated assertion which contradicts much of the hard evidence they already have.

If you go next to the follow-up the CMA did do in August 2022. It's on tab 91, page 770, September 2022. The CMA writes in the email at the bottom of the page -- they're following up on their response to question 33 of the questionnaire, where concern was expressed about competition and the CMA is saying: please give us some examples and give us instances. The tribunal can read for yourselves. The CMA is asking for the very detail which I say they needed in order to make a rational finding and we see the answer at the top of the page:

"I wouldn't have any specific emails I could share with you on this matter."

Again, a vague and unsubstantiated impression and then this concern at the end of that sentence. The concern is about ceasing to supply products entirely and that's not the SLC. That's not the concern the CMA expresses anywhere in the SLC, that concern they could be cut off. It's completely illogical that the merged entity would

cease supplying one of the four big retailers in the UK. It begs the question why would they bother buying Jus-Rol, if they would cut off their own arm and cease to supply one of their own major customers, not least because of the competitive threat from other private label suppliers.

Moving on then to tab 108, and this is the meeting. It begins at page 905. Page 909 and 910. Line 19, the question is asked:

"How do you decide how much of the dough-to-bake you stock and how much of it should be private label and how much Jus-Rol?"

And the answer is given in yellow. I can't read it. 909, over the page to 910.

I ask you to read down to line 16 on page 910. **(Pause)**

Again, this emphasises the point we've seen again and again that how they stock and how much they stock depends on what the customer wants. It's driven by the customers. When customers start switching. At no point do they say: how much we stock and whether we stock one or the other is as a result of our negotiating threat with them to switch volumes, if they don't offer us better terms and services. That dynamic isn't referenced at all. They are being led by their customers and they are deciding on the range allocation based on what the customers are saying, which is not -- I just come back to Mr Ridyard's concern -- the SLC that the CMA identifies. It's a separate point. The CMA is saying, putting to one side the customers' preferences, the retailers themselves exercised that negotiating lever over the suppliers, to say that: if you don't supply us according to the terms and conditions we want and prices we want, we can switch away from you. And that's not dependent on demonstrating customer preferences, that's a power the retailers are said to have vis-a-vis Cérélia and Jus-Rol.

MR RIDYARD: I am still wondering how realistic it is to separate these things out because the shelf space, shelf allocation, is sort of where it all comes to a point, isn't

it? If, as a retailer, I have a limited shelf space for these products and my job, I am trying to maximise the profitability of that shelf space, so as these answers are saying, they are going to look to see how the different products perform and you'd normally expect them to analyse the data in some detail and decide that product A is performing better than product B and, therefore, it makes sense to give it more space or give the successful products more space and the unsuccessful products less space because then I will make more money overall.

So isn't, potentially, that mechanism, whereby given I have limited shelf space for this category of product, given that there is some competitive interaction at consumer level between the products, this is the forum within which competition between branded and private label products occurs and then if one of these products is performing poorly, then one of the things you might expect the retailer to do is to have a word with the supplier, saying: at the moment your product is underperforming on my shelf. In order to justify it carrying on being there, I would like a better price or a better quality product.

MR KENNELLY: It's that last bit is what the CMA focuses on and that's what's missing. Everything until that point is consumer driven and is not a function of wholesale competition. Retailer facing competition between Cérélia and Jus-Rol.

The point, sir, you put to me was at the end of that consumer reaction, do the retailers say: your product is faring badly? If you don't give us -- improve your product or lower your price, we will switch away from you to Jus-Rol or Cérélia, we will do so. That's the bit. That's the bit, that's the constraint the CMA say exists and that's what's missing. What actually happens is that doesn't happen. What happens is the consumers make a preference and the retailers follow their consumers and they list or they change their volumes on that basis, full stop. They just stop there.

They don't go on to say: and by the way, because you are failing on the shelves, or for whatever other reason, you need to improve your offer, lower your prices or change

your services, otherwise we'll switch to your rival. The implication being: and if you do improve your promotions or lower your prices, we will not switch away. And that's what we don't see and that's the constraint the CMA say exists and that's just not there.

MR RIDYARD: I see. Thank you.

MR KENNELLY: On this same document -- so you've seen again, I think I have everything I need from page 910. At page 911 now, just to make sure I am not cherry picking, I am taking you to the bit the CMA relies on too. Page 911, question at line 8 and the question is from line 8 down to line 14. The answer is given -- and, if I may say so, rather a leading question -- from line 15 to line 21. It makes this point about limited shelf space. **(Pause)**

Then, over the page, 911 -- sorry, before I move on, on the basis of that answer, we see from line 15 to line 21 that's the very kind of allocation we've been seeing that I discussed with you, sir, Mr Ridyard. The point here is it's not suggested that if they are not happy with the price increase from Cérélia or Jus-Rol, they say: you better fix that, otherwise we will allocate away from you, but if you do fix it, we won't. That bit is missing, even on this answer. So, unsurprisingly, the CMA follow up and ask the question at the top of 912 -- struggling here, really trying to get the answer they want from lines 2 to 6. Again, a very leading question from 2 to 6 and although we see the answers given at the beginning of line 7, we look at the rest of it between lines 7 and 15. **(Pause)**

Then page 913, the point is made between 912 and 913, it's harder on the branded side. Top of 913, just for the tribunal's note because we'll come to this, there is a question about who else can supply private label and you see there is a reference to Bells and the source is from Europe, it's Henglein. There's obviously awareness of other private label suppliers and if the prices were too high or poor service, they could open a tender document to get different private label supply.

But then the next question from seven to 11, asking about these levers that are being discussed. The questions between volume, mix and changing supplier and you see the answer between 12 and 18. So there's flex in between private label and Jus-Rol but there's no examples of ever actually using this flex as a lever. What we see from these documents is from a retail perspective, products are moved around the shelves and that has impact on what they buy at a wholesale level but it's never used as a lever to get better terms from Jus-Rol or Cérélia, which is what's needed to show that it's a competitive constraint, the competitive constraint found by the CMA.

Then at 915, line 2, the question again is coming from the CMA, asking about how this constraint is supposed to work and a reference to negotiations. That's from lines 2 to 7. Looking for specificity. I would ask the tribunal to read -- and again, I can't read this, it's all in yellow -- the answer from 915 all the way to 917. The reason why I ask the tribunal to indulge me is that you won't see here a threat to switch channel, if Jus-Rol doesn't offer a better deal. **(Pause)**

I emphasise line 10 on page 916.

(Pause)

At the top of 917, again the CMA is looking for specificity. You see that in the lilac highlighted part. We get the answer. This is how your brand is performing and stuff like that. We see what they say about monitoring them and targets. But none of it involves a threat to switch away from Jus-Rol to Cérélia if Jus-Rol doesn't improve its service or change its prices.

Then the question is asked:

"Well that's all about GMI, Jus-Rol. Is it different on the Cérélia side?"

Now we see they say "Not really", but then we look at the answer. Does the answer actually support the CMA's case? It's all based on consumer performance.

Again, the question is being asked again and again: would you put pressure on Cérélia

to improve, would you flex this negotiating lever that the CMA thinks might exist? The answers they are getting just don't demonstrate such a lever. 11 to 17.

Because the question is not just: if you are too dear, we will use more of the other; the question is: are you using this as a lever to negotiate with Cérélia and Jus-Rol? It's all retail driven.

Then if you go to 924, page 924, line 7:

"What would you do if Cérélia increased the price or degraded the quality of the product, what would your response be?"

I suppose the question:

"Would you say to Cérélia, you've got to reverse that price increase because we'll shift volumes to Jus-Rol; is that what they say?"

And the answer is:

"No, that's not what they say."

You see that from the answer given by the retailer in yellow and the rest of page 924.

(Pause) The very, very last, the section ends at the very top of 925.

Then 926, the CMA asks:

"What would you do if Cérélia, post-merger, increase the price or degraded the quality of the Jus-Rol products?"

And see the answer from line 23 on page 926. They don't say: first of all, we would switch away to private label, until line 2.

Just to understand exactly when this switching might occur, putting to one side the fact it's not actually being put to Cérélia or Jus-Rol as a negotiating lever in any of these examples, but just looking at what's required for a retailer to engage in cross-channel switching in this way, what would prompt them to do it, that's what we are looking at here, questions 12 to 14 on page 927, you would check whether there are other branded alternatives but if there were not, you would refocus your volumes into private

label. This is if the Jus-Rol prices were too high. So:

"When would you refocus your volumes into private label?"

Look at the answer from 15 onwards:

"Only" -- and I am emphasising, of course, the words you see on line 16. That is the extent of the price rise that would be required to prompt them to do the kind of switching the CMA says is the constraint.

We are still not seeing any evidence that even with a price rise like this, they would go back and say: you've got to reverse that price rise, otherwise we'll switch volumes away from you and to the other channel. This, again, is not consistent and coherent evidence of a threat that Cérélia volumes would be replaced by Jus-Rol volumes and vice versa, used by retailers to extract better terms from Cérélia or Jus-Rol.

I am moving on now, if I may, to the last of the retailers. Phase 1 questionnaire on tab 75 in the CMA bundle and MDB2, I think. Page 525, please. You can see which retailer it is from its name in the middle of page 525. Question three:

"Please explain the reasons why you purchase private label products from a single or multiple manufacturing packaging supplier."

The point is here you see it's a customer of Cérélia.

Question four on 525, the answer is given for private label products. You see the answer at the top of 527. So Jus-Rol is supplier of branded products. Then 536, question 18 -- sorry, 535 is the question:

"Do you have any views about the impact on competition of this acquisition? Please explain."

We see what this retailer says about its concerns about competition on 536, at the top of 536.

If you go to the phase 2 questionnaire at tab 90, at page 750 it begins -- I am looking at questions seven to 14. These go from page 577 and following. I am going to skip

over this relatively quickly because you've seen all these questions before. The important point is there's no suggestion in any of the answers that any kind of rebalancing threat is used, even implicitly, to drive better terms from Cérélia or Jus-Rol. If you go to question 17, if you switch to alternative supplier from private label -- I am sorry, paragraph 17 --

MR CUTTING: Sorry, you said there's no evidence in this retailer's answer about flexing; is that right?

MR KENNELLY: No, no suggestion of using replacement threat. There's evidence of switching volumes of private label and Jus-Rol. It's the replacement threat. It's evidence -- and I keep coming back to this, it reflects the discussion I had with Mr Ridyard. It's not enough to say: consumers prefer one or the other, one does well, one does badly and the allocation is changed on the shelf. The CMA focuses on the next stage which is the retailer is saying to Cérélia and Jus-Rol: either you better change your price or offering or it's doing badly on the shelves but for whatever reason, we will switch away from you to Jus-Rol or Cérélia, unless you give us what we want. That's the replacement threat. Even implicitly, that's the threat that's alleged and that's what we don't see here.

MR CUTTING: Except in answer to question 17.

MR KENNELLY: Exactly. So look at 17 and, again, I can't read it out, but you see about opportunities to flex margin of space to get more favourable terms and there is a concern about private label margin erosion which is a difference but there is a reference here to flexing space to get more favourable terms. I emphasise the words might be; there might be. It's tentative but the real concern here again, as you see, is that Cérélia's prices would increase. We see that later in the same document.

So there is a suggestion here about using that flex to get more favourable terms but, again, it's very vague and it's not substantiated. I come back to the point I made

earlier -- by the way, you read this bearing in mind what this same retailer said about its concerns about competition in the phase one questionnaire I took you to. But if this is to be relied upon, it needs to be substantiated, otherwise it's a bare assertion in a single sentence.

We turn to page 765, question 25:

"Do you consider that Cérélia and Jus-Rol will compete with each other in the supply of dough-to-bake products in the UK?"

You see the answer. Then 768, page 768. Questions 31 and 32, again we've seen many times. The "Yes" box is ticked. You see there what they say would be their reaction if the prices were to increase.

The point is they would say: if the prices were too high, we would renegotiate better terms or back our private label business.

There's no reference here that they would be threatening to switch to Jus-Rol or Cérélia. At best, it's a vague reference to potential renegotiations, where that switching might be raised but it's not explicit. There's nothing explicit about switching or, sorry, threatening to switch volumes in order to get better terms.

Question 32 again is all about following the customers, where the customers express a concern. That's what drives them back to renegotiate. The CMA followed up, looking for specificity on this, in August and we see that at tab 99. Tab 99, page 830. If we begin at 831. I am sorry, yes, page 830. We begin on page 830. You see at the bottom of 830, the question. The question the CMA has asked is in the lighter text. They were looking for instances where leveraging of the competitive tension occurred. The same question we see again and again and over the page, 831, at the very top, this is the retailer's evidence of the existence or absence of leveraging.

Obviously, a data problem for the 4 years before the previous year but this is the evidence that the CMA has from this retailer at this stage. It saw the bare assertion.

It looked for substantiation and it doesn't get any.

The next call, the follow-up from the CMA, was in September. Tab 112 this time, a meeting with the same retailer. If you go, please, to page 962. I'm afraid here I am going to ask the tribunal to read much of this on your own from 962 to 964 and then I will show you what I need on 966. But if you could read from 962 to 964, down to line 18, I would be very grateful.

(Pause)

THE CHAIR: Yes.

MR KENNELLY: So, again, they are dealing specifically with the query about flexing shelf space between Jus-Rol and Cérélia to get better terms from them, explicitly asking about shifting shelf allocation from one to the other in order to get better terms. And the response makes no reference to that kind of rebalancing threat. What we see is the retailer making decisions driven by customer demand and reversing decisions where they realise there was still a customer demand for the business that was dropped and making decisions based on rationalisation.

In this lengthy answer dealing with the specific query, there's nothing to suggest the exercise, even implicitly, of any kind of rebalancing threat to obtain better terms from Cérélia or Jus-Rol. If you go on to page 966, again line 9, they are asked about whether Cérélia and Jus-Rol are competing with each other and the answer, in my submission, is all about retail competition and that's clear from the perspective of the person that is referenced at the very last sentence at line 13.

Then a hypothetical suggested from line 15:

"If, before the merger again, Jus-Rol significantly increased its prices, would you have considered stocking and therefore buying more private label products as a result of that price increase?"

This answer is key:

"I think that would be considered in relation to what would happen to volumes with customers."

They wait to see what happens with customers and then you read the rest of that answer down to line 22. You see the kind of impact, the extent of the impact they'd need to see on volumes before they would shift from one to the other and even then they are not saying: and we'd go back to them and say: you better give us better terms, otherwise we'll do this shift which is the exercise of the negotiating lever.

These are positing extreme scenarios which do not suggest this is an important, universally acknowledged and constantly invoked implicit threat, driving competition between Jus-Rol and Cérélia before the retailers.

Then page 968, they are asked:

"Post-merger, with Cérélia owning the brand, did that affect the negotiating position, your ability to get a good deal?"

And we see the answer on page 968 from lines 7 to 8. Hardly a resounding endorsement, in my submission, of the CMA's SLC.

Similarly, lines 14 to 17 on page 968.

Again:

"Post-merger, if Cérélia put their prices up, what are the options for you?"

Answer:

"We'd probably go back out to the market to see if someone could do these products for us."

That's the private label constraint we'll come to. Then over the page, 969:

"So you'd go to the market and look what alternative supplier options there might be. Would you be confident to find an alternative?"

He says:

"It's difficult to say. They'd consider what suppliers were in the UK. Equally, they'd

consider suppliers within Europe because there are suppliers out there."

I will come back to those when we discuss that part of it.

Now those are the four major retailers. You have my point that between them, from what you've seen, that's not a coherent and consistent evidential base to support the specific implicit rebalancing threat, specific theory of harm that these retailers threaten Jus-Rol and Cérélia to switch volumes away from them if they don't improve the terms and conditions they offer them. It's just not there. Other things are there for sure but not that implicit rebalancing threat. There's one other retailer referenced in schedule 3, Notice of Application. I am not going to go to it, in view of the time, but the evidence from that retailer also doesn't support the existence of the constraint alleged by the CMA and you will appreciate I have been tracking the evidence that we referred to in schedule 3 but in more detail to the Notice of Application.

But finally, there was one other retailer relied on by the CMA and I will show you how they relied on it in the Final Report, core bundle-tab 3, page 194. This is paragraph 9.54. 9.54, page 194. The CMA says -- this is on the question of grocery retailer views on competition between the parties:

"Two-thirds of the grocery retailers, six out of nine, responded to our questionnaire, told us there was a degree of competitive tension between the parties that they can use as a lever in negotiation."

First of all --

THE CHAIR: Just give me the paragraph number.

MR KENNELLY: 9.54. Sorry, sir. On page 194.

Sorry, just to repeat them.

THE CHAIR: Yes, repeat.

MR KENNELLY: I was too hasty. The CMA says:

"Two-thirds of the grocery retailers, six out of nine who responded to our questionnaire,

told us there was a degree of competitive tension between the parties they can use as a lever in negotiations."

Pausing there. You've seen the evidence base for that claim. There may be competitive tension at the retail level that we see, as I have said many times now. No probative evidence of it being used as a lever in negotiations.

But one sees among those retailers relied upon, you see one retailer named at the very end of that list and the footnote 469, support for that proposition, gives the phase 2 questionnaires that each of those retailers completed.

I just want to show you that retailer phase 2 questionnaire because it says no such thing. That is in tab 138 of the confidential bundle. Question 17 is the question relied upon by the CMA in its Final Report. Footnote 49 cites question 17 as the support for this proposition that each of these retailers says there is a degree of competitive tension they could use as a lever in negotiations.

So we go to page 1356 and we see question 17:

"What impact do you consider the merger would have on your negotiations with your private label and branded suppliers?"

I would ask the tribunal to read the rest of that box under question 17. **(Pause)**

The tribunal can see this is a concern, that they felt better off negotiating with General Mills because they were a bigger customer of General Mills. There's absolutely nothing in this answer that had anything to do with competitive tension between Cérélia and Jus-Rol. There's nothing here that says there is a degree of competitive tension between Cérélia and Jus-Rol that they can use as a lever in negotiations. Now the CMA says: this is only one retailer, what difference does it make? But for the tribunal, this is typical, we say, of the errors and exaggerations you see in the Final Report. I have not taken you back to how all of the evidence I showed you was spun in the Final Report. That's really immaterial. The question for the tribunal is, is the

evidence that you've seen sufficient, rationally, to reach the SLC --

MR CUTTING: I wonder if I could ask you a question, thinking about what the CMA says of this retailer's answers to question 17 which you've pointed out, doesn't talk about the channel switching. But their answer to question 32, I just wonder whether that's consistent with the CMA's interpretation?

MR KENNELLY: On page 1364 and 1365?

MR CUTTING: Yes. I mean that's about switching from branded own label, isn't it, in response to a potential increase in price?

MR KENNELLY: Yes, the question about the extent of whether that's a constraint in negotiations at all. The materiality of the constraint is questioned by the second sentence in the box. But this is a long way from saying this is a direct negotiating lever between Jus-Rol and Cérélia. This is a long way from that. Cérélia may not see anything out of the suggested route that's taken here.

This doesn't bolster in any way the reliance the CMA can place on it for the purpose of that critical finding at 9.54.

What you've seen overall, most of the large retailers did express concerns about the merger at a high level but in my submission, when you look at their evidence, those concerns were generally about having choice on the private label supplier side. It had nothing to do with the substance of Jus-Rol and since Jus-Rol and private label compete to an extent for consumers, in my submission, there is confusion as to the impact of that consumer competition with the kind of competition that's being discussed between the retailers and the CMA in these questions. There are references to competitive tension between Cérélia and Jus-Rol at the wholesale level. Few references but there are some but in my submission, those are vague, speculative and unsubstantiated, and when the substantiation was sought, it was lacking and an inference should rationally have been drawn from that lack of substantiation.

The specific examples are documents that were given, did not show any threat of replacement or any threat operating as a constraint on either of them. We would expect, in these circumstances, to see documents. Out of the thousands of documents before you, we'd expect to see from these sophisticated and extremely cost conscious businesses, negotiating on a regular basis with Cérélia and Jus-Rol, emails saying: give me better terms or I will switch volumes to Cérélia or Jus-Rol, as the case may be.

You have my submission that that lack of documents is all the more striking because, in substance, GSCOP does require de-listing volume reduction threats to be documented.

Now true it is, as I think Mr Ridyard picked up, it can't be every change of volume, it must be significant, but that is precisely the question the CMA should rationally be asking. It's only a significant threat that generates the constraint which, if removed, creates a substantial lessening of competition; and where there is going to be a significant reduction in volume, notice does need to be given and the retailer does get an opportunity to demand changes because no final decision is taken until the senior buyer reviews the request to change the decision.

That is, in substance, an opportunity to exercise and use the lever that the CMA says exists to say: we are going to reduce volumes significantly or de-list unless -- because your price is too high or your service is no good, and that's not final until it's been reviewed by the buyer, and we would expect to see in those emails evidence of the replacement threat. Even an implicit one would have to be recorded, according to GSCOP.

Now the CMA says in relation to this: well, retailers couldn't threaten explicitly because it would be a breach of competition law to say, well, Jus-Rol is offering us X and so you must offer us Y. That answer -- and we'll come to it in the internal

documents -- just isn't credible. These are large and well-advised businesses with in-house lawyers, as we've seen. They negotiate hardball with suppliers every day and they know well that they can use one supplier's offer to induce better terms from another supplier without breaching competition law.

We'll see the ways in which they do that but not by reference to the implicit rebalancing threat. Specifics do not need to be given if this were an effective threat. It's no breach of competition law for a retailer to say to Cérélia: your private label price is just too high, relative to what I am being offered by Jus-Rol, and I am minded to switch volumes away from you to the brand unless you give me a better price. That's not a breach of competition and that's exactly what we don't see in these thousands of documents from the retailers.

So what does the CMA do? It falls back on the internal documents from the parties. So I am now going to go -- well, perhaps it may be for tomorrow -- to the CMA's case by reference to the parties' own documents, having completed my survey of the --

THE CHAIR: Yes, we'll do that tomorrow. So how are we doing for timing?

MR KENNELLY: I am slightly behind but I will make sure I finish on time tomorrow. I may have to be relatively brief --

THE CHAIR: When you say on time tomorrow, what time do you mean by that?

MR KENNELLY: Well, between Mr Palmer and I, we discussed me finishing at 12.30 tomorrow.

THE CHAIR: Okay.

MR KENNELLY: And me having an hour in reply, which would give him the same --

THE CHAIR: Shall we start at 10.15 tomorrow? That will give you a bit more time.

MR KENNELLY: Yes.

THE CHAIR: Because I don't want you to feel rushed.

MR KENNELLY: I am grateful, but I should be able to cut my cloth --

THE CHAIR: Yes, and, if need be, we can sit until five tomorrow so everyone can feel there's a bit more time, because there's nothing worse as an advocate feeling that you just have time pressure. You are making progress and I understand that your case does require us to look at the materials.

So we will start at 10.15 and potentially we'll go up until five.

MR KENNELLY: I am grateful.

(4.28 pm)

(The hearing adjourned until Tuesday, 11 July 2023 at 10.15 am)